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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 24th November, 2021
+ **CM(M) 1253/2019 & CM APPLs. 38214/2019, 24763/2021**
KIRAN BALA Petitioner
Through: Mr. Vatsal Kumar and Ms. Anita
Sorswat, Advocate (M: 9051495434).

versus

SUBHASH SAHNI & ORS Respondents
Through: Mr. Jitin Sahni, Advocate for R-1 and
2 (M: 9711267999).
Mr. Dev Rishi, Advocate for R-3 (M:
9910919225).

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done in physical Court. Hybrid mode is permitted only in cases where permission is being sought from the Court.
2. The present petition arises out of the impugned order dated 28th May, 2019 passed by the Ld. ADJ-11 (Central), Tis Hazari Courts, Delhi in **CS No.184/2018** titled "**Subhash Sahni & Anr. v. Tarun Sahni & Ors.**" (hereinafter "**Trial Court**"). By the impugned order, the application under Order I Rule 10 CPC filed by the Petitioner has been rejected by the Trial Court. The operative portion of the impugned order reads as under:

"This Court has gone through the record carefully. The plaint is bereft of any pleadings regarding existence of HUF. The sale deed dated 9.12.1998 in respect of suit property was executed between previous owner Sh. Inderjit Singh Bajaj and

purchaser namely Shyam Sunder Sahni, Ramesh Sahni and Subhash Sahni. It is a registered Will.

***Clause 4** of it states that possession of the ground floor is with a tenant namely Peshawar Sweets Bhandar but as to how it is related with rights and interest of the applicant is not clarified anywhere in the application at hand or even in the rejoinder filed by the applicant.*

The status might have been different if the applicant was in a position to challenge the Will of Shyam Sunder Sahni executed on 17.3.2015 by which he bequeathed his partnership share in the ratio of 33.33% each later reduced to 16.33%, on his son Tarun Sahni to the exclusion of all his legal heirs including his wife. Admittedly, the applicant is attesting witness to this Will. Not only the above, she furnished an affidavit (Page 45 and 46 of the paper book) in the probate proceedings pending before Hon'ble High Court of Delhi affirming the Will.

*In **Matadeen Roy Vs Mussodun Singh (1868) 10 W.R. (C.R.) 293**, the implication of attestation made by one brother made in a document executed by another brother. The observations made are; "When the plaintiff put his name as a witness to his brother's signature to a deed conveying the whole of the property, the Court might reasonably infer that he knew that his brother was selling the whole of the property. If he knew that his brother was selling the whole of the property and his own, and allowed him to do so without objection, it would be evidence against him either that the whole property did belong to his brother or that he was acquiescing in his brother's act of selling the whole." This again is a clear authority for the proposition that attestation by a person, who has an interest, raises the prima facie presumption that he knows the contents and acquiesces in the disposition of the property by the deed he attests."*

*This judgment has been cited with the approval in **Thangamani Vs Ganesan dated 23.11.2014 passed by the Hon'ble Madras High Court in Appeal (MD) No. 136 of 2010 and M.P (MD) No. 2 of 2010.***

The same analogy will apply now to the present applicant.

It being so, she cannot be said to be either a necessary or proper party without whom the fact in issue cannot be adjudicated upon. Hence, the application is dismissed.”

3. The said application arises out of the suit seeking partition of immovable property and consequential relief of permanent injunction, instituted by the Plaintiffs/Respondents herein, Mr. Subhash Sahni and Mr. Saket Sahni, against the legal heirs of Late Sh. Shyam Sunder Sahni and Late Ramesh Chand Sahni. The suit seeks partition of immovable property bearing No. 114, Shankar Road Market, New Rajinder Nagar, New Delhi. (hereinafter “suit property”). As per the Respondents, the suit property, is jointly in the name of three brothers, namely, Late Sh. Shyam Sunder Sahni, Late Sh. Subhash Chand Sahni and Late Sh. Ramesh Chand Sahni. It is the case of the Respondents that all the three brothers are owners of 1/3rd share in the suit property. Reliance is placed upon the Will dated 17th March, 2015 executed by Late Sh. Shyam Sunder Sahni.

4. In the suit, an application has been filed by the Petitioner-Ms. Kiran Bala, the sister of the three brothers named hereinabove, under Order I Rule 10 CPC claiming that she would be a necessary and proper party in the suit. The case of the Petitioner is that her father, Late Sh. Chunnilal Sahni, had established a business in the name and style of M/s. Peshawar Sweet Bhandar, in which all members of the family, including the female members were entitled to equal shares.

5. The Petitioner further submits that the suit property was purchased out of the funds generated from the business of the M/s Peshawar Sweet Bhandar. Thus, she seeks impleadment in the suit in order to place her stand on record before the Court prior to the suit being adjudicated. The said application has been rejected by the Trial Court on the ground that the Petitioner is an attesting witness to the Will dated 17th March, 2015 executed by Late Sh. Shyam Sunder Sahni. Further, since she is the attesting witness in the said Will, and the Will clearly stipulates that the three brothers have 1/3rd share each in the suit property, her stand is contrary to the said Will.

6. Mr. Sanjeev Sindhwani, Id. Senior Counsel appearing for the Petitioner, makes the following submissions:

(i) The Petitioner being an illiterate person, the fact of attesting the will would not result in a conclusion being drawn that she was aware of the contents of the documents. Reliance is placed on following four judgments:

- ***Pandurang Krishnaji Vs. M. Tukaram and Ors.***
[AIR 1922 PC 20]
- ***Rajammal and Ors. Vs. Sabapathi Pillai and Ors.*** ***[AIR 1945 PC 82]***
- ***Sarwar Shah Vs. Abdullah Shah and Ors.*** ***[AIR 1963 J&K 14]***
- ***Chandrakantaben and Ors. Vs. Vadilal Bapalal Modi and Ors.*** ***[AIR 1989 SC 1269]***

(ii) Even in the Sale Deed dated 9th December, 1998 by which the suit property was purchased, there is an admission that Rs. 7 lakhs were paid in cash and Rs. 2 lakhs were paid by

way of demand draft, in full and final settlement of the sale consideration of the suit property. As per the Petitioner, the said 2 lakhs had been transferred from her account to the brothers' accounts to enable the purchase. These facts have been stated in the suit being **CS No.322/2020** titled "**Smt. Kiran Bala v. Sh. Subhash Sahni & Ors.**" which is now stated to have been filed by the Petitioner *qua* the suit property seeking cancellation of the sale deed dated 9th December, 1998 along with declaration, permanent and mandatory injunction. The said suit is stated to have been filed in July, 2020 and is currently pending before the Court of Ld. ADJ-09, Central District, Tis Hazari Courts, Delhi.

7. On the other hand, Id. Counsel appearing for the Respondents herein, makes the following submissions:

- (i) The Petitioner is not only the attesting witness to the Will dated 17th March, 2015, but has also repeatedly admitted the execution of the Will. The repeated admissions by the Petitioner would show that she is not entitled to any relief *qua* the suit property, and the suit property is only to be divided between the three brothers and their respective legal heirs.
- (ii) Reliance is placed on the copy of the evidence filed by way of affidavit by the Petitioner in the probate petition being **Test Case No.26/2017** titled "**Sh. Tarun Sahni v. The State & Ors.**" seeking probate of the Will dated 17th March, 2015 of Late Sh. Shyam Sunder Sahni, wherein she admits that

Sh. Sahni has left behind 1/3rd share in the suit property.

- (iii) Reliance is placed upon the Rejoinder dated 20th March, 2019 filed on behalf of the Petitioner in the application under Order I Rule 10 CPC before the Trial Court, wherein the said fact of 1/3rd share of each of the brothers in the suit property is admitted. He submits that the evidence was filed in probate petition after filing of the rejoinder in the application. Thus, this is a conscious stand which has repeatedly been taken by the Petitioner. Hence, she cannot be allowed to argue to the contrary in the present case.
- (iv) Even in the revision petition, the Petitioner admits that Late Sh. Shyam Sunder Sahni is the *karta* of the family and that the Will was duly attested by the Petitioner.

8. A perusal of the plaint filed before the Trial Court shows that it is a suit for partition filed by two co-owners of the suit property against the legal heirs of the third co-owner in respect of the suit property. The Petitioner, Ms. Kiran Bala, has repeatedly admitted the fact that her three brothers owned 1/3rd share each, in the suit property. The said admissions are contained in at least two documents. First, in the Rejoinder dated 20th March, 2019 filed on behalf of the Petitioner in the application under Order I Rule 10 CPC, the Petitioner admits that she was the attesting witness to the Will dated 17th March, 2015. The relevant extract of the said Will and the Rejoinder reads as under:

Will Dated 17th March, 2015

“I give and bequeath my moveable as well as immoveable properties as under:

a) It is my last wish that on my death my 1/4th undivided share in H.No.4A/26 2nd floor. Old Rajinder Nagar, New Delhi-60 should devolve jointly in the name of my son Tarun Sahani and my wife Smt. Usha Sahani. They will own 1/4th share in the property jointly after my death. It will be the duty of my son to take care of my wife in all respects in future. My daughters will have no right or interest in my share in the said property.

b) My share i.e. 16.33% in the partnership business under the name and style of M/s. Peshwar Sweet Bhandar, which is run from Shop No. 114, Shankar Road Market, Rajinder Nagar, New Delhi-60 shall devolve exclusively upon my son Tarun Sahani to the exclusion of all my legal heirs including my wife. After my death my son will become owner of 33.33% in the partnership business along with the others. My wife and my daughters will have no right to interfere in the said partnership in any manner whatsoever.

c) My one third share in the immovable property and structure bearing No.114, Shankar Road Market, Rajinder Nagar, New Delhi-60 shall devolve upon my son Tarun Sahani after my death exclusively to the exclusion of all my legal heirs. After my death my son will become owner of one third share in the immovable property and structure standing thereon. He will be entitled to deal with the said share in any manner whatsoever and my wife and daughters will have no right to interfere in my share in the said property.

d) On my death all my moveable property of whatsoever nature and quality where-so-ever situate shall and will devolve exclusively/ solely to my son namely Tarun Sahani who shall be the exclusively sole/owner thereof and have all the rights (which I am having) in the moveable estates.”

Rejoinder dated 20th March, 2019-

“11. In reply to para 11 of the Preliminary Objections and Submissions it is submitted that the applicant is only an attesting witness to the execution of said Will. The applicant is an illiterate lady. The applicant only witnessed said Will as a witness in good faith and the same does not in any manner contradict the will. The applicant has 1/8th share as submitted in the application. Furthermore the Testamentary Court has not to decide the title of the property involved in the Will but has only to see as to whether the Will is properly executed. The preceding reply be also read as reply to this para as the contents of same are not being reproduced here for the sake of brevity and to avoid repetition. The contents of the application are correct and be also read as part of this para as the contents of same are not being reproduced here for the sake of brevity and to avoid repetition.”

9. Secondly, the evidence by way of affidavit filed by the Petitioner in the probate petition. The relevant portion of the said document is extracted hereinbelow:

Evidence by way of Affidavit filed in Test Case No.26/2017-

“5. I say that the deceased at the time of his death, left behind the following immovable property i.e.

A) 1/4th Share in House No. 4A/26, 2nd Floor, Old Rajinder Nagar, New Delhi-110060.

B) 1/3rd Share in immovable property and structure bearing no. 114, Shankar road Marker, Rajinder Nagar, New Delhi-60.

6. I say that the deceased at the time of his death, he left behind the movable property i.e.

A)16.33% share in the partnership business under the name and style of M/s. Peshawar Sweet Bhandar, which is run from shop no. 114, Shankar Road Market, Rajinder Nagar, New Delhi-60.

7. I say that the deceased executed a Will dated 17.03.2015 wherein he has bequeathed all his properties both movable and immovable. I further say that I was present at the time the will dated 17.03.2015 was executed and the will bears my signatures as one of the attesting witness.

8. I say that the Will is exhibited as **EXPW 1/1**. I further say that this is the last Will and testament of the deceased."

10. A perusal of the impugned order dated 28th May, 2019 also clearly shows that the Trial Court has proceeded on the basis that the Petitioner has admitted the position as to the ownership of the Respondents in the suit property. The Petitioner has also, as an attesting witness in the Will of Late Sh. Shyam Sunder Sahni acknowledged the 1/3rd share in the suit property of her brothers. Thus, the above admissions cannot be ignored by this Court.

11. This Court is of the opinion that the impleadment of the Petitioner in the suit would result in enormous delay in the adjudication of the said suit, as is evident from the fact that the suit was filed in 2018 and to date, no final order has been passed. The immovable property which is the suit property is distinct and different from the business of M/s. Peshawar Sweet Bhandar, in which the Petitioner claims rights. The Petitioner has also filed a suit seeking cancellation of the sale deed dated 9th December, 1998 along with declaration, permanent and mandatory injunction. The said suit being **CS No.322/2020** titled "**Smt. Kiran Bala v. Sh. Subhash Sahni & Ors.**", is yet to be adjudicated.

12. Considering the aforementioned facts, the Petitioner, who does not have any rights in the suit property, cannot be allowed to be impleaded in the suit before the Trial Court as she is neither a necessary and proper party in the suit for partition. Further, a suit for partition is to be adjudicated only amongst co-owners, without the intervention of any third party. This settled position of law has been reiterated by the Supreme Court in ***Shub Karan Bubna @ Shub Karan Prasad Bubna v. Sita Saran Bubna & Ors. [(2009) 9 SCC 689]***. The relevant portion of the said judgment has been extracted below:

“4. ‘Partition’ is a re-distribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them, into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. ‘Separation of share’ is a species of ‘partition’. When all co-owners get separated, it is a partition. Separation of share/s refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother. In a suit for partition or separation of a share, the prayer is not only for declaration of plaintiff’s share in the suit properties,

but also division of his share by metes and bounds. This involves three issues: (i) whether the person seeking division has a share or interest in the suit property/properties; (ii) whether he is entitled to the relief of division and separate possession; and (iii) how and in what manner, the property/properties should be divided by metes and bounds?”

13. Thus, in view of the categorical admissions made by the Petitioner, as also the fact that the three brothers are the recorded owners of the suit property, the application under Order I Rule 10 CPC has been rightly dismissed by the Trial Court. The impugned order dated 28th May, 2019 does not warrant any interference. Accordingly, the present petition is liable to be dismissed. The Trial Court shall now proceed expeditiously in the suit for partition instituted by the Respondents.

14. It is made clear that the observations made in the impugned order dated 28th May, 2019, or by this Court in the present proceedings, would not in any way prejudice the Petitioner in the proceedings which she may avail of, in respect of the rights claimed by her in the business of *M/s. Peshawar Sweet Bhandar*.

15. With these observations, the present petition, along with all pending applications, is disposed of.

16. The digitally signed copy of this order, duly uploaded on the official website of the Delhi High Court, www.delhihighcourt.nic.in, shall be treated as the certified copy of the order for the purpose of ensuring compliance. No physical copy of orders shall be insisted by any authority/entity or litigant.

PRATHIBA M. SINGH, J

NOVEMBER 24, 2021/MR/AD