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

Date of decision: 02.11.2023

+ **CM(M) 101/2023, CM APPL. 3354/2023 & CM APPL. 49280/2023**

NATHU RAM & ANR. Petitioners

Through: Dr. V. P. Singh and Mr. Yashaswi
Singh, Advocates

versus

VINOD KUMAR & ORS. Respondents

Through: Mr. Vikas Gachli with Mr. Tarun
Sanjeev, Advocates (through VC)

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CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

1. This petition filed under Article 227 of Constitution of India impugns the order dated 20.10.2022 passed by the ADJ-10, Central District, Tis Hazari Courts, Delhi ('Trial Court') in civil suit no. 939/2022, titled as "**Vinod Kumar and Ors. v. Nathu Ram and Ors.**", whereby the Trial Court passed an ad-interim order in the Respondents (i.e., the plaintiffs') application filed under Order XXXIX Rule 1 and 2 of Code of Civil Procedure, 1908 ('CPC').

1.1. The Trial Court vide impugned order issued the following ad-interim injunction directions:

"Considering so, the plaintiffs' application U/O 39 Rule 1 & 2 is allowed and an ad-interim ex-parte injunction is passed in favour of the plaintiffs and against the defendants thereby restraining the defendants, their legal representative, agents their servants or any other person acting



on their behalf from creating third party interest in the suit properties more particularly shown in site plan and further restraining the defendants from making any Will and if any such Will has been executed then the operation of any such Will is stayed in the interest of justice.

A decree of ex-parte interim injunction and permanent injunction in favour of the plaintiff and against the defendant is also passed thereby restraining the defendants their legal representatives, agents, their servants or any other person permanently from illegally disposing off the Petitioners from the suit property in the interest of justice till final disposal of the present suit.

Nothing mentioned hereinabove shall tantamount to be an expression of opinion on the merits of the present case.”

(Emphasis Supplied)

2. The Petitioner No.1 is the recorded owner of the properties bearing H. Nos. 1403 and 1404, First and Second Floor with roof up to the sky, Shora Kothi, Subzi Mandi, Delhi – 110007 ('suit property').
3. In this impugned ad-interim order, the Trial Court has issued an unusual restraint against the Petitioners i.e., the defendants, restraining them from executing a Will qua the suit property. The impugned order further grants a permanent injunction at an ad-interim stage, which as well is contrary to law.
4. Learned counsel for the Respondents i.e., the plaintiffs state that it is the stand of the plaintiffs that though the suit property stands recorded in the name of Petitioner No.1, the sale consideration at the relevant was paid by the common ancestor i.e., late Sh. Kripa Ram. And, therefore the suit property is an ancestral property, and execution of a Will by Petitioner No.1 would lead to creation of third-party interests.
5. However, the said order is silent on any provision of law under which the defendant can be restrained from making a testamentary dispossession of his right, title and interest in the suit property.



6. This Court is not persuaded by the said submission of the Respondents. In the plaint, the Respondents have asserted that they have 3/5th share in the suit property and the Petitioners herein have 2/5th share. Thus, the right, title and interest of the Petitioners to the extent of 2/5th share is admitted. Even otherwise, as on date, the Petitioner No.1 is the sole owner of the suit property and as per the government records, 100% right, title and interest qua suit property vests in him.

7. The right of the Petitioner No.1 to dispose of all his property (self-acquired or otherwise) by way of testamentary succession is statutorily recognised under Section 30 of the Hindu Succession Act, 1956 ('Act of 1956') read with Indian Succession Act, 1925.

7.1 Section 30 of the Act of 1956 recognises the right of the Hindu to bequeath his interest in the Mitakshara Coparcenary property even without there being a partition.

8. In this regard, it would be instructive to refer to judgment in ***Radhamma and Ors. v. H.N. Muddukrishna and Ors., (2019) 3 SCC 611***, wherein the Supreme Court has held that the interest of a male Hindu in Mitakshara coparcenary property can be disposed of by him by Will. The relevant extract of the said judgment reads as under:

“7. Section 30 of the Act, the extract of which has been referred to above, permits the disposition by way of will of a male Hindu in a Mitakshara coparcenary property. The significant fact which may be noticed is that while the legislature was aware of the strict rule against alienation by way of gift, it only relaxed the rule in favour of disposition by way of a will of a male Hindu in a Mitakshara coparcenary property. Therefore, the law insofar as it applies to joint family property governed by the Mitakshara School, prior to the amendment of 2005, when a male Hindu dies after the commencement of the Hindu Succession Act, 1956 leaving at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the



surviving members of the coparcenary. An exception is contained in the Explanation to Section 30 of the Act making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property can be disposed of by him by will or any other testamentary disposition and in the given facts and circumstances, the testator Patel Hanume Gowda was indeed qualified to execute a will bequeathing his undivided share in the joint family properties by a will, Ext. D-2 dated 16-6-1962.

8. The submission of the learned counsel for the appellants in claiming independent share as a member of the family in the joint family properties is without substance for the reason that the appellants have no independent share in the joint family properties and their share could be devolved in the undivided share of the testator in the joint family properties and since the testator has bequeathed his share/his undivided coparcenary interest by will dated 16-6-1962, no further independent share could be claimed by the appellants in the ancestral properties as a member of the family as prayed for.

(Emphasis Supplied)

9. A Will comes into operation after the death of the testator. Through the Will, the testator puts in place the mechanism of devolution of his property in favour of his legal representatives after his death. This Court, therefore, rejects the contention of the Respondents that the Will creates any third party rights. It is trite law that a bequest under the Will would operate only to the extent of the right, title or interest which the testator has in the property. The Will by itself does not create any right in the property, if the testator does not have any.

10. In the facts of this case, the Petitioner No.1, presently is the 100% owner of the suit property and even as per the Respondents, is entitled to 1/5th share in the suit property. The Petitioner is therefore, well within its right to execute a Will so as to decide its devolution. However, the execution of the Will would in no manner affect the jurisdiction of the Court to determine the claims raised in the suit and as it would have happened in case of intestate succession, the legal representative under the Will would be



similarly bound by the final decision of the Court with respect to title of the suit property, in the trial.

11. This Court therefore, finds that the direction issued by the Trial Court restraining the Petitioner No.1 from creation or execution of Will, is unreasoned and without any jurisdiction. It imposes an onerous restraint on Petitioner No.1 and interferes in his statutory right to plan a succession. This Court is of the opinion that no prejudice can be caused to the Respondents if the Petitioner No.1 executes a Will.

12. Accordingly, to the limited extent of the direction of the Trial Court restraining the defendants from making any Will and the further direction that if such a Will has been executed the operation of the same will be stayed, is hereby set aside.

13. With respect to other ad interim directions issued, the same are not being interfered with by this Court as learned counsel for the Petitioner seeks liberty to withdraw this petition and avail his statutory remedy of appeal under Order 43 Rule 1 of CPC.

14. In view of the fact that the present petition has remained pending before this Court, the Petitioner will be entitled to seek exclusion of limitation at the time of the institution of the statutory appeal. He is at liberty to file his appeal within a period of four (4) weeks.

15. With the aforesaid directions, with liberty reserved to the Petitioner, the present petition is disposed of. Pending applications stand disposed of.

MANMEET PRITAM SINGH ARORA, J

NOVEMBER 2, 2023/msh/aa

Click here to check corrigendum, if any