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

+ **FAO(OS) 30/2024 & CM APPL. 13656/2024**

KAPIL KUMAR SHARMA

..... Appellant

Through: Mr. Kuljeet Rawal, Advocate

versus

LALIT KUMAR SHARMA AND ANR

..... Respondents

Through: None

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Date of Decision: 05th March, 2024

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMOHAN, ACJ: (ORAL)

CM APPL. 13657/2024 (For exemption)

1. Allowed, subject to all just exceptions.
2. Accordingly, present application stands disposed of.

FAO(OS) 30/2024 & CM APPL. 13656/2024

3. The present appeal has been filed under Section 10 of the Delhi High Court Act, 1966, challenging the impugned order dated 15th December, 2023 passed in CS (OS) No. 1632/1996, whereby the learned Single Judge dismissed the I.A. No. 5942/2023, filed by the defendant no.1 under Order VI Rule 17 of Code of Civil Procedure, 1908 ('CPC'), seeking amendment of written statement, to incorporate a proposed new preliminary objection no.2 qua non-maintainability of the suit for partition.



4. The Appellant is the defendant no.1, the Respondent No.1 is the plaintiff and Respondent No.2 is the defendant no.2. The parties are siblings.

Brief Facts

5. The suit has been filed seeking partition of the property bearing No. R-752, New Rajinder Nagar, New Delhi ('suit property') owned by the parties' father, late Sh. Dharam Chand Sharma on the plea of intestate succession. The Appellant filed his written statement in the said suit on 7th January, 2002, objecting to the grant of decree of partition, inter alia, on the ground that late Sh. Dharam Chand Sharma had executed a Will dated 10th January, 1995, bequeathing the suit property in favour of son of Appellant – Master Chanakya. The Appellant herein subsequently, (as a guardian) instituted a probate petition being Test Cas. No. 40/1999 seeking probate of the alleged Will dated 10th January, 1995.

6. The issues were framed in the suit on 16th July, 2003 and on 24th January, 2005 in the probate petition. Since, both the suit and the probate petition pertained to the determination of rights in the suit property, the learned Single Judge vide its order dated 20th October, 2005, held that it is necessary that these matters be tried together; and further opined that relief of partition would depend on the issue that whether the Appellant is able to prove the validity and genuineness of the Will dated 10th January, 1995 in the probate petition.

7. Pertinently, the Appellant's probate petition was dismissed by the learned Single Judge on 12th September, 2019, with imposition of costs of Rs. 3,00,000/-. The said order of dismissal of the probate petition has since attained finality. The consequence of dismissal of the probate petition is that



the estate of late Sh. Dharam Chand Sharma shall devolve intestate on his Class-I legal heirs.

8. The underlying suit is now listed for final hearing, in view of the dismissal of the probate petition and the earlier order dated 20th October, 2005. However, in the interregnum the Appellant filed the I.A. No. 5942/2023 dated 23rd March, 2023, which has been dismissed vide impugned order.

Arguments of the counsel for the Appellant

9. Learned counsel for the Appellant states that since the learned Single Judge *vide* earlier order dated 20th October, 2005 had directed that both the suit and probate petition are to be tried together, the Appellant led evidence in the probate proceedings and exhibited the 'list of movable assets' owned by late Sh. Dharam Chand Sharma, in the said proceedings. He states that therefore, in view of the said order, the Appellant did not file the said list in the suit proceedings, to avoid repetition.

9.1. He states that the Appellant by way of his application seeks to merely incorporate a preliminary objection to the maintainability of the suit on the ground of it being a partial suit for partition as the movable assets of late Sh. Dharam Chand Sharma have not been filed with the plaint; and for placing on record the said list of movable assets.

9.2. He states that the list of movables is within the knowledge of the parties and the Appellant thus, was merely seeking their incorporation in his written statement.

Analysis

10. We have heard the learned counsel for the Appellant and perused the record.



11. Before proceeding further, it would be relevant to refer to the order dated 20th October, 2005, passed by the learned Single Judge at the onset of the trial in the suit and the probate petition, in exercise of its powers under Order XVIII Rule 3 CPC, relevant portion whereof reads as under: -

“2. In so far as the issue of exhibiting the documents in pursuance to the affidavits is concerned, learned counsel for defendant No.1 states that he has certain objections as some of the documents have not been filed in the present proceedings. It is stated by learned counsel for the plaintiff that the original documents have been filed in the probate proceedings. It will be open to defendant No.1 to raise objections in accordance with law.

*3. The issues were framed on 16.07.2003. **The present suit is one for partition.** Defendant No.1 in opposition to the claim of intestate succession has propounded the will of Late Shri Dharam Chand Sharma dated 10th January, 1995. Defendant No.1 has also separately filed probate petition No.40/1999 for grant of probate of the said will. There are also certain, technical objections taken by defendant No.1 to the suit on which issues have been framed.*

*4. In view of the aforesaid, it is **agreed** that in so far as issue No.2 is concerned, relating to the execution of the will, the **onus** is on defendant No.1. Issue No.2 should accordingly be read as under:*

“2. Whether late Dharam Chand, Sharma had executed WILL dated 10th January, 1996 as alleged? OPD-1”.

*5. In my considered view, it is necessary that both the suit and the probate petition be tried together. I am also of the considered view that in view of the fact that the onus in so far as execution of the will is concerned is naturally on defendant No.1, the defendant No.1 should be directed to lead evidence first in the suit. A perusal of the issues framed on 16.07.2003 clearly shows that onus of issue Nos.1 and 3 are already on the defendant. **Only issue No.4 has onus on the plaintiff which is relief of partition. Thus the relief of partition would depend on whether defendant No.1 is able to prove the will dated 10th January, 1995.***

5. Since the affidavits have already been filed by the plaintiff the defendants are directed to file their affidavits by examination-in-chief within 8 weeks since defendant No.1 is stated to be out of country. It is



made clear to learned counsel for defendant No.1 that extra long time has been granted in view thereof and no further time shall be granted.

7. The Joint Registrar is appointed as the local commissioner to record evidence. 8. List before the Joint Registrar for further directions on 9th January, 2006.”

(Emphasis Supplied)

12. It is a matter of record that the probate petition proceedings have since been dismissed by the learned Single Judge vide detailed judgment dated 12th September, 2019, the operative portion whereof reads as under: -

*“33. In view of the fact that the Petitioner has **failed** to prove the Will in question, the present petition is dismissed. The Respondents are also held to be entitled to the **cost** of the litigation which is assessed as **Rs. 3 lacs**. The cost shall be paid by the Petitioner to the Respondents in equal share within a period of four weeks from today.*

34. In view of the foregoing decision, the Petition along with the pending application, if any, is dismissed.”

(Emphasis Supplied)

13. The judgment dated 12th September, 2019, has attained finality as admittedly, no appeal has been filed by Appellant against the said dismissal. Therefore, in view of the aforesaid dismissal of probate petition, we are of the considered opinion that the relief of partition prayed for in the suit was to follow consequentially, as was contemplated vide order dated 20th October, 2005. The consequence of the dismissal of the probate proceedings was that there is no dispute late Sh. Dharam Chand Sharma died intestate and the suit property would therefore, devolve upon his Class-I legal heirs by intestate succession. In fact, we are surprised that the suit for partition has remained pending from 2019 to 2024.

14. The filing of the application (i.e., I.A. No. 5942/2023) by the Appellant for amendment of the written statement on 23rd March, 2023, to incorporate a preliminary objection to the maintainability of the partition



suit on account of non-inclusion of the movables of late Sh. Dharam Chand Sharma is mala fide. The said application is clearly intended at obstructing the passing of the decree of partition with respect to the suit property.

15. The list of the movable properties as per the Appellant were available with him since the year 1999 when the probate petition was filed. However, no objection to its exclusion from the partition suit was raised by him in the written statement filed on 7th January, 2002. The existence, if any, and the custody of the said movable properties as in the year 2023 (i.e., the date of the filing of amendment application) has not been disclosed in the pleadings. Pertinently, the Appellant is not even seeking a partition of the said alleged movable assets by way of the amendment application. The mischief is writ large, inasmuch as the list of movables include reference to alleged assets such as Fiat Car Model 1982, BMW Motor Cycle, Geyser etc. Considering the fact that the deceased, who allegedly owned these movable assets passed away on 23rd January, 1996, we fail to fathom if such assets even exist as on date. It is thus, apparent that the filing of the application is intended only to delay the grant of the final relief of partition qua the suit property. The claim of partition and succession with respect to the alleged movable assets is therefore, excluded from the purview of the present suit and the right, if any, of either party can be agitated in the appropriate proceedings subject to the law of limitation.

16. The submission of the Appellant that evidence remains to be led by the Plaintiff to prove the issues framed on 16th July, 2023 is incorrect and is in teeth of order dated 20th October, 2005. With the dismissal of the probate petition, the Class-I legal heirs are entitled to the equal shares in the suit property.



17. We may also note that as per the Appellant's own stand, he is in physical possession of the suit property to the exclusion of the other parties. The intent behind filing the amendment application and stalling the passing of the partition decree is to perpetuate the said possession. In fact, the Respondents herein, who have been deprived of actual and physical possession of the suit property, are entitled to restitution by the suit Court by directing the Appellant herein to pay appropriate mesne profits to the Respondents for the period of exclusion. In this regard, it would be relevant to refer to judgement of this Court in ***Sita Kashyap and Anr. v. Harbans Kashyap and Ors.***¹, wherein this Court held as under:-

“21. In a suit for partition though there is no specific prayer for awarding profits, the Court has power to direct an enquiry into profits and grant a decree for plaintiff's share therein. This proposition was expressly approved by the Madras High Court in the case of Basavayya (supra). In fact, it becomes the duty of the Court in a suit for partition, to make an enquiry into profits even if there is no claim for profits, so as to balance the equities between the parties. If one of the co-owners has been deriving some profit by way of rent etc. or is in possession of a portion disproportionate to his share in the property subject matter of the partition, it becomes the duty of the Court to adjust the equities by directing appropriate division of profits, if any, earned from the property, which is subject matter of the partition or by directing appropriate payment by a person, who has been occupying a portion larger than he ought to be occupying considering his share in the property, to the sharer(s), who is either totally divested of possession or has been in possession of lesser portion as compared to his share in the property. Of course, such payment/adjustment can be directed by the Court only with respect to the mesne profits subsequent to the filing of the suit.....”

(Emphasis Supplied)

18. In view of the aforesaid observations, we do not find any error in the impugned order dismissing the application seeking amendment as the same is not bona fide and has been filed to disrupt and protract the suit

¹ 2011 (123) DRJ 52



2024 : DHC : 2009-DB



proceedings and set at naught the order dated 20th October, 2005. Accordingly, the present appeal is dismissed along with pending application.

19. The Registry is directed to list CS(OS) No. 1632/1996 before the learned Single Judge on 20th March, 2024, for passing appropriate orders and directions in the suit in furtherance to the order dated 20th October, 2005, in view of the dismissal of the probate petition.

20. It also appears from a perusal to the reply filed by Respondent No. 2 to IA No. 5942/2023 that the Appellant herein has wilfully failed to pay cost of Rs. 3,00,000/- imposed by the Court in the probate petition, which was to be paid within four weeks from 12th September, 2019. The Appellant is directed to pay the costs on or before 20th March, 2024 failing which his defence in the suit proceedings shall stand struck off.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

MARCH 5, 2024/rhc