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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) 105/2023, CM APPL. 50073/2023, CM APPL. 50074/2023, CM APPL. 50075/2023 & CM APPL. 50076/2023**

VEENA SURI

..... Appellant

Through: Mr. Rajesh Goswami and Ms. Rashi Goswami, Advocates

versus

RAVI SHANKER LUTHER AND ORS

..... Respondents

Through: Mr. Pawanjit Singh Bindra, Senior Advocate with Ms. Kanicka Mittal, Advocate for R-1 & 2.
Mr. Rohit Shukla, Advocate for R-5

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Date of Decision: 30th January, 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)

1. The present appeal has been filed against the interlocutory order dated 02nd February, 2023 ('impugned order'), passed in TEST.CAS. No. 74/2014, whereby the learned Single Judge of this Court has dismissed an application i.e., I.A. No. 21670/2020, filed seeking summoning of Witness Nos. 4 and 5 from the List of Witnesses and for recalling an earlier Witness i.e., Sub Registrar-V, Tehsil Building, Mehrauli.
2. The learned Single Judge by the impugned order has disallowed the aforesaid application after recording that the proposed Witnesses Nos. 4 and



5 are official Witnesses and the Applicant has not placed on record any document which is sought to be proved by summoning the officials from the concerned departments. The learned Single Judge recorded that since evidence in the matter stood concluded on 06th August, 2019, the present application filed by the Applicant i.e., Appellant herein, is in the nature of a fishing and roving inquiry. With respect to the prayer for recall of PW-4 i.e., Sub Registrar -V, Tehsil Building, Mehrauli, the learned Single Judge observed that a similar prayer for recalling the said witness had been dismissed by an order dated 28th August, 2018, which has attained finality. The Court also recorded that no valid ground had been made out for recall of the said witness.

3. Learned counsel for the Appellant states that the proposed Witnesses Nos. 4 and 5 are sought to be summoned to prove that the consideration paid by the deceased testator i.e., late Sh. Charanji Lal, for purchasing the property bearing no. 16, Link Road, Lajpat Nagar, New Delhi ('suit property') was from the funds, made available to him in lieu of the properties of the family left behind in Lahore, Pakistan during partition. He states that though the title of late Sh. Charanji Lal is not in dispute, however, the Appellant contends that the consideration was made available from the compensation received on account of migration. He states that PW-4 is sought to be called to prove the illegality in the registration of the Will dated 20th September, 1987.

4. Learned senior counsel for the Respondents No. 1 and 2 has raised an objection to the maintainability of the present appeal. He states that in the probate proceedings, the only issue arising for consideration before the



Court is to determine the validity of the Will. He states that the title of the testator in the suit property cannot be determined by the Court in probate proceedings and the learned Single Judge has therefore, rightly dismissed the application.

5. This Court has considered the submissions of the learned counsel for the parties.

6. The Appellant has preferred the present appeal purportedly under Order XLIII Rule 1(f) of Code of Civil Procedure, 1908 ('CPC') read with Section 10 of Delhi High Court Act, 1966 ('Act of 1966').

7. However, the provision of Order XLIII Rule 1(f) of CPC provides for an appeal against an order passed under Order XI Rule 21 of CPC and therefore, the said provision is not applicable to the impugned order.

8. With respect to invocation of Section 10 of Act of 1966, the Full Bench of this Court in **Jaswinder Singh v. Mrigendra Pritam Vikramsingh Steiner**¹ has categorically held that to maintain an appeal under the said proviso, the impugned order must satisfy the test of a 'judgment' as per the parameters laid down by Supreme Court in **Shah Babulal Khimji v. Jayaben D. Kania**². The relevant portion of the judgment of the Full Bench in **Jaswinder Singh** (supra) reads as under:

*"39. We, thus, conclude by laying down the following principle of law:
In case of an order passed by the learned Single Judge in exercise of ordinary original civil jurisdiction in case of a non-appealable order under Section 104 read with Order 43 of the said Code which meets that test of a "judgement" that decides matters of moment or affects vital and valuable rights of parties and which works serious injustice to the parties concerned as per the parameters laid down in Shah Babulal Khimji case (supra) by the Supreme Court, an appeal to the Division Bench would exclusively lie under*

¹ 2013 (133) DRJ 1 (FB)

² (1981) 4 SCC 8



Section 10 of the said Act and not under Clause 10 of the Letters Patent.”

9. We are of the considered opinion, that the impugned order fails to meet the test of a ‘judgment’ as stipulated in the *Shah Babulal Khimji* (supra) and therefore, the present appeal is not maintainable under Section 10 of the Act of 1966. The impugned order does not decide any matter of the moment, which cannot await challenge as per Section 105 read with Order XLIII Rule 1(A) of CPC.

10. The Appellant has not disputed before this Court the findings of the learned Single Judge that (a) that the recording of the evidence stood concluded on 06th August, 2019; (b) no documents which are sought to be proved by summoning proposed Witnesses No. 4 and 5 are on record; and (c) the issue of validity of the registration of the Will and/or mutation in the records of the Municipal Authority can be determined on the basis of the record. It is trite law that the title of the testator in the subject property cannot be determined in the probate proceedings; however, the Appellant admits that the title of the suit property vests in the testator and for this additional reason, this Court finds no ground for entertaining the present appeal. This Court is, therefore, satisfied that the impugned order does not work any serious injustice to the Appellant and the present appeal cannot be maintained against the impugned order.

11. Accordingly, the present appeal and applications are dismissed.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

JANUARY 30, 2024/msh