



2025:DHC:907



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

% ***Pronounced on: 10th February, 2025***

+ **C.R.P.102/2022**

1. **SMT. NEELIMA SHARMA @ BHAKTI SHARMA**
D/o Late Sh. Krishan Swaroop Sharma
W/o Late Sh. Vaibhav Sharma
R/o E-36, Gali No. 3, Shashtri Park,
Delhi-110053Petitioner No.1
2. **SMT. VINITA SHARMA @ NITI SHARMA**
D/o Late Sh. Krishan Swaroop Sharma
W/o Shri Vipin Sharma
R/o 65, Baldev Park, Parwana Road,
Krishna Nagar, Delhi-110051Petitioner No.2
Through: Mr. Siddharth Aggarwal and Mr.
Gaurav Sindhwani, Advocates.

versus

1. **SHRI SATYAVRAT SHARMA**
S/o Late Sh. Krishan Swaroop Sharma
WHATSAP No. 9654639025 ...Respondent No.1
 2. **SHRI KAPIL SHARMA**
S/o Late Sh. Krishan Swaroop Sharma
WHATSAP No: 9210988173
- All R/o: B-4/153, YAMUNA VIHAR,
DELHI-110053Respondent No. 2

Through: None

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T



NEENA BANSAL KRISHNA, J.

1. The Petition under Section 115 of the Code of Civil Procedure, 1908 (*hereinafter referred to as 'CPC'*) has been filed on behalf of the Petitioners/Plaintiffs, to challenge the Order dated 07.03.2022 dismissing the Application under Order XII Rule 6 CPC, by the learned Additional District Judge-01, Delhi.
2. The facts in brief, are that the Petitioners/Plaintiffs had filed a *Suit for Partition and Permanent Injunction* against the Respondents and Smt. Phoolwati Sharma, who has expired intestate during the pendency of the Suit on 12.05.2021. Since all her legal heirs were already parties to the Suit, an Application under Order 22 Rule 2 CPC was filed, which is pending disposal.
3. The facts narrated in the Suit by the Petitioners(plaintiffs) are that Late Sh. Krishan Swaroop Sharma due to his own hard work had made several movable and immovable properties (*hereinafter "the two suit properties"*) during his lifetime, which are as under:-
 - i. *Land and entire built up ground and first floor in property bearing No.B-4/153, Yamuna Vihar, Delhi-110053;*
 - ii. *12 Bigha land in Village Chingariya, VPO Pusawali, Dist. Sambhal, Uttar Pradesh.*
4. Sh. Krishan Swaroop Sharma died intestate on 27.03.2012 leaving behind five legal heirs, namely, his wife, Smt. Phoolwati Sharma, Defendant No. 1, Smt. Neelima Sharma @ Bhakti Sharma as a daughter, Plaintiff No. 1 and two sons, namely, Sh. Satyavrat Sharma and Sh. Kapil Sharma, Defendant Nos. 2 and 3 respectively. The Plaintiff claimed that she being



one of the five legal heirs acquired 1/5th undivided share in the aforementioned properties. The Plaintiffs requested the Defendants on several occasions including on 07.05.2018, 27.05.2018 and 16.06.2018 to partition the Suit Properties but they never paid any heed. She came to know that the Defendants were contemplating to sell the Suit properties making it difficult for the Plaintiff to obtain the partition of the Suit Property. Hence, she filed a Suit for Decree and Partition and also for Division of Property by metes and bounds.

5. The *Defendants/Respondents in their Written Statement* claimed that the Plaint does not disclose *any cause of action* as Late Sh. Krishan Swaroop Sharma, their father had not died intestate but had bequeathed all his movable and immovable properties amongst his wife and sons, *through an Oral Will*, which he uttered just before he breathed his last, in the presence of his neighbours and relatives who were present at that time, about which the Plaintiffs are well aware.

6. Moreover, at the time of marriage of the Plaintiff, deceased had given sufficient gifts, ornaments, dowry articles to them and even after marriage, he had been performing his social obligations towards the Plaintiffs, being the father. However, at the advance stage of life, the deceased was harassed and tortured by the Plaintiffs and their husbands, who brought disrepute to him amongst the relatives. Consequently, in order to avoid any future complications and controversies *qua* the properties, the deceased orally bequeathed the properties to his wife and the sons. The present Suit has been filed by the Plaintiffs with a *mala fide intention* despite being aware of the Oral Will.



7. The Defendants further asserted that the Suit was *barred by time*. As per the Limitation Act, 1963, the Suit could have been filed within three years from the demise of the owner. In the instant case, the deceased had died on 27.03.2012 and the Suit has been filed only in July, 2018 i.e. after six years and four months from the death of the deceased. The Suit is, therefore, liable to be dismissed on the ground of Limitation.

8. Further Objection was taken that the Suit has not been *valued properly for the purpose of Court Fees and jurisdiction*. The Plaintiffs are not residing in any portion of the Suit Property No. B-4/153, Yamuna Vihar, Delhi and do not they having a joint possession by way of cultivation or otherwise *qua* the agricultural land situated in Village Ghingariya, V.P.O. Pusawall, District Sambhal, Uttar Pradesh. In fact, the Plaintiffs are residing in their respective matrimonial homes as reflected in the memo of parties. However, in order to claim joint possession of the entire property and to avoid payment of ad valorem court fee as per the Court Fees Act, they have falsely alleged to be in joint possession. It is claimed that the valuation of the Suit Property has been done at Rs.1,74,00,000/- when in fact the value of the property is more than Rs.4,00,00,000/-.

9. **On Merits**, all the averments made in the Plaint were denied and the plea of Oral Will was reiterated.

10. *An Application under Order 12 Rule 6 CPC, 1908* was filed by the Plaintiffs, for decree on admission. It was asserted that it is an admitted fact that the Plaintiffs are the daughters of Late Sh. Krishan Swaroop Sharma, who was the owner of the Suit Properties. The Defendants are the wife (since deceased) and the two sons. A plea of Oral Will has been taken, which is defined under Section 65 of the Indian Succession Act, 1925. The



privileged/Oral Will can be made only by a soldier employed in an expedition or engaged in actual warfare, provided he has completed the age of 16 years in the manner provided in Section 66 of the Indian Succession Act, 1925.

11. Section 66 of the Indian Succession Act, 1925 further illustrates that a privileged Will being made in exigent circumstances by a soldier posted in extreme conditions facing certain death, is valid only if made Orally.

12. It was thus, claimed that any other person who intends to make a Will, is governed by Section 63 of the Indian Succession Act, 1925 which stipulates an unprivileged Will to be made in writing with signatures of the testator and two attesting witnesses. This Court in Sunita Shivdasani vs. Geeta Gidwani and Anr., AIR 2007 Delhi 242 while examining the validity of an Oral Will made by a Hindu who was a person other than a soldier, held that a Hindu not being a soldier cannot make a privileged Will after 01.01.1927, even if other conditions of Section 65 are satisfied.

13. It was further asserted that the Defendants had claimed that the Suit for Partition was barred by Limitation since it has been filed six years, after the demise of their father. However, the period for Limitation for filing the Partition Suit is 12 days from the date when a claim adverse to the Plaintiffs/co-owners, is notified to the world at large including the Plaintiffs who are the concerned persons, as has been held in Smt. Kanak Lata Jain & Ors. vs. Sh. Sudhir Kumr Jain & Ors., RFA No. 232/2011, by this Court.

14. It is further asserted that though the Defendants have claimed that the *ad valorem* court fee should have been paid by the Plaintiffs but in numerous Judgments, it has been explained that if the Plaintiffs claim to be the daughters and in joint legal possession of the Suit Property, *they are*



liable to pay a fixed Court fee in terms of Article 17(vi) of Court Fees Act, 1870. Reliance has been placed on Suresh Kapoor vs. Shashi Krishan Lal Khanna & Ors., CS(OS) 236/2010.

15. The Plaintiffs have specifically averred that they continued to be in joint possession of the Suit Properties as they have never been ousted by anyone from the properties. The Plaintiffs have thus, asserted that in view of the admissions by the Defendants, the Suit for Partition may be decreed. Reliance has been placed on Mrs. Rama Ghei vs. U.P. State Handloom Corpn., 91 (2001) DLT 386 and Mrs. Kamal Saroj Mahajan vs. Mr. Charanjit Lal Mehra and Ors., 113 (2004) DLT 788.

16. A decree under Order 12 Rule 6 CPC of Partition on the basis of admissions made in the Written Statement was sought by the Plaintiffs.

17. The Defendants in their **Reply** had reasserted that on account of the Oral Will of the father, the Plaintiffs are not entitled to the Suit for Possession.

18. Learned ADJ while considering the rival contentions, observed that there was no direct or indirect admission on the part of the Defendants. Moreover, the power to give Judgment under this Rule was enabling and discretionary and cannot be claimed by a party as a matter of right. Moreover, for pronouncing a Judgment on admission, the Court must be satisfied that the admission is definite and unequivocal. It was observed that in the present case, the claim of the parties should be decided by having a full-fledged trial in the matter and it was not a fit case for decree under Order 12 Rule 6 CPC, 1908. The Application was consequently dismissed.

19. Aggrieved by the said Order, the **present Revision Petition** has been filed. The grounds of challenge essentially are that no cogent explanation or



reason, have been given by the learned Trial Court while dismissing the Application under Order 12 Rule 6 CPC, 1908. There are clear unequivocal and unambiguous admissions in the Written Statement. The plea of *Oral Will* is not tenable under law. The Suit had been *filed within limitation*. Therefore, the impugned Order deserves to be set-aside and a Decree of Partition may be passed in favour of the Plaintiffs.

20. The Respondents were served through WhatsApp and the learned Counsel had been appearing on behalf of the Respondent No. 1. He was granted an opportunity to address the arguments.

21. **Submissions heard and the record perused.**

22. It is an admitted case of the parties that Late Sh. Krishan Swaroop Sharma, their father, was the owner of the two Suit properties. It is further not in dispute that he died on 27.03.2012 and was survived by his two daughters/Plaintiffs, the mother/Defendant No. 1 (since deceased) and two sons, who are the Respondents.

23. The only defence that was taken on behalf of the Respondents was that at the time of the demise, the father had made an *Oral Will* whereby he bequeathed all the properties to his wife and the two sons. However, as has been rightly agitated on behalf of the Plaintiffs/Revisionists, the *Oral Will* can be made under Section 66 of the Indian Succession Act, 1925 by a soldier and that to in the conditions as defined therein.

24. A Hindu under *Section 65 the Indian Succession Act, 1925* can only make an unprivileged Will, which means it has to be a document in writing, which bears his signatures and attested by two witnesses. Admittedly, no written Will had been executed by their father, in terms of *Section 65 of the Indian Succession Act, 1925*.



25. The Division Bench of this Court in Sunita Shivdasani vs Geeta Gidwani, 2007 SCC OnLine Del 200 held that *Hindus cannot make a privileged Will after 01.01.1927 even if conditions of S. 65 are satisfied. S. 66 of the Act will obviously have no application to Hindus as the said Section relates to mode of execution of an oral or a privileged Will and other conditions for a valid oral will.*

26. The plea of Oral Will of the deceased is not tenable under Section 66 of the *Indian Succession Act, 1925* and is blatantly taken by the Defendants to claim a false defence.

27. *It has to be necessarily held that Late Sh. Krishan Swaroop Sharma had died intestate. Consequently, his property would bequeath on all of his five legal heirs, who were originally the party to the Suit.*

28. The *second plea* taken on behalf of the Respondents was that the Suit was filed beyond a period of three years, from the demise of Late Sh. Krishan Swaroop Sharma and was **barred by Limitation**. Admittedly, the Suit has been filed six and a half years, after the demise of Late Sh. Krishan Swaroop Sharma. However, the limitation for seeking partition commences not from the date of demise of Sh. Krishan Swaroop Sharma, but from the date when the Defendants start making a claim adverse to that of the co-sharers.

29. As held by this Court in Geeta Tandon vs Dr. Sunil Gomber & Anr., 2023 SCC OnLine Del 2067, it is pertinent to note that Article 65 to the Second Schedule of the *Limitation Act, 1963* provides that the limitation period to file a partition suit is 12 years which begins to run only when possession of the defendant becomes adverse to the plaintiff.



30. According to Articles 69 and 110 of the Schedule II Limitation Act, 1963 the right to sue for partition arises from the day when the cause of action arises. The right of seeking partition is continuing and a definite cause of action arises only when a demand for partition is made.

31. The plaintiffs had started asking for partition from 07.05.2018 and the Suit was filed on 18.07.2018 and therefore, the Suit is filed within Limitation.

32. *This contention of the Defendants/Respondents is not tenable and does not raise any valid defence.*

33. The *third ground* for contesting the claim of the Plaintiff as agitated by the Defendants, was that the ***requisite court fee*** has not been paid by the Plaintiffs. It is asserted that they were never in possession of the Suit Properties and thus, are liable to pay ad valorem Court Fees on the value of the Suit Property.

34. To determine this issue, it is pertinent to take note of the rights of co-owners in a joint holding and the consequences thereof, which were laid down by the Apex Court in the case of Jai Singh and Ors. v. Gurmej Singh, bearing Civil Appeal No. 321 of 2009 decided on 09.01.2009. It was elucidated that a co-owner has an interest in the whole property and also in every parcel of it. Possession of joint property by one co-owner is in the eyes of law, possession of all, even if all but one are actually out of possession. A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all. Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to disturb the arrangement without the consent of others



except by filing a suit for partition. Therefore, mere possession of one may not be an indicator of division by metes and bounds. However, in order to negative the presumption of joint possession on behalf of all on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other as, when a co- owner openly asserts his own title and denies, that of the other.

35. Furthermore, it was held by this court in Prakash Wati vs Dayawanti, (1990) 42 DLT 421, that in the case of co-owners, the possession of one is in law the possession of all, unless ouster or exclusion is proved. By relying on the judgement in Jagdish Pershad v. Joti Pershad, 1974 SCC OnLine Del 214, this court in Prakash Wati (supra) re-iterated that when the plaintiff asserts shared possession of the property for which partition is requested, whether actual or constructive, the plaintiff is only required to pay a fixed court charge in accordance with Article 17(vi) Schedule II of the Court Fees Act, 1870. Thus, *ad volarem* court fee under Section 7(iv) (b) of the Court Fees Act, 1870 can be applied only when the plaintiff has been ousted from its enjoyment of the suit property and seeks restoration of the joint possession by way of a suit as was held in Asa Ram Vs. Jagan Nath and others, AIR 1934 Lahore 563.

36. Also, in the case of Nisheet Bhalla Vs. Malind Raj Bhalla, AIR 1997 Delhi 60, Coordinate Bench of this Court held that in order to decide the question of court fee, averments made in the plaint are to be seen and the decision cannot be influenced by the pleas taken in the written statement or by the final decision of suit on merits. It is only when the ouster or the exclusion from the property is proved that the question of *ad valorem* Court Fee may arise.



37. Thus, so long as there is joint possession in law, it is not necessary that the plaintiff should be in actual possession in whole or part of the property. In the present case, since there is no Will to prove the exclusive title of the Defendants, and the ouster of the Plaintiff has also not been proved, the ground raised by the Defendants is not tenable.

38. Since the Plaintiff was in joint possession of the suit properties, the Suit has been rightly valued as per Article 17(vi) of Schedule 11 of the Court Fees Act, 1925.

39. From the pleadings and the above discussion, it emerges that admittedly, Late Sh. Krishan Swaroop Sharma was the owner of the Properties and he has died intestate. These facts are admitted any the defences raised by the defendants are not tenable in law. He is survived by the Plaintiffs i.e. two daughters and Defendants i.e. two sons and wife, each entitled to 1/5th share *in the two Suit Properties*. Since the mother has expired and there has not been any averment that she had executed any Will in lieu of her 1/5th share, this 1/5th share gets equally divided amongst the four surviving Legal Heirs *entitling the parties to the suit to 1/4th share each, in the two Suit Properties*.

40. **The impugned Order dated 07.03.2022 is hereby set-aside and the Application under Order 12 Rule 6 of CPC, 1908 is hereby allowed.**

Relief:

41. **A Preliminary Decree of Partition is, therefore, passed holding that the two Plaintiffs and the two Respondents are entitled to 1/4th share each, in the two Suit properties.**



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42. The Parties are directed to appear before the learned Trial Court on 18.02.2025 for further proceedings and passing of the Final Decree.

43. The Petition is disposed of accordingly, along with pending application(s), if any.

**(NEENA BANSAL KRISHNA)
JUDGE**

FEBRUARY 10, 2025/RS