



2026:DHC:7604



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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Date of Decision: 02.09.2026*

CNR No.DLHC010082592021

+ CS(OS) 81/2021

SUMAN GARG & ORS.

.....Plaintiffs

Through: Mr. Rajat Aneja, Sr. Adv., Mr.
Abhinav Chauhan and Mr. Saubhagya
Chauhan, Advs.

versus

KAMAL KUMAR GARG & ORS.

.....Defendants

Through: Mr. Manuj Aggarwal and Ms. Shakshi
Sharma, Advs.**CORAM:****HON'BLE MR. JUSTICE SACHIN DATTA****SACHIN DATTA, J. (ORAL)****O.A. 94/2026 (filed on behalf of the plaintiff against order dated 26-02-2026)**

1. By this appeal under Chapter II Rule 5 of the Delhi High Court (Original Side) Rules, 2018 read with Section 151 CPC, the plaintiffs assail an order dated 26.02.2026, whereby the learned Joint Registrar (Judicial) directed that the plaintiffs shall lead evidence first in CS(OS) 81/2021 and rejected the contention of the plaintiffs that having regard to the nature of the controversy and the issues framed, the onus to adduce evidence first must rest on the defendants.

2. The only question before this Court is the sequence in which evidence is to be adduced in the present suit for partition. The sole defence are two



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Wills, which the plaintiffs have prayed should be declared null and void.

Factual background

3. The suit property bearing No. B-268, Saraswati Vihar, Pitampura, Delhi-110034, admeasuring 241.11 sq. yards was purchased by Late Ram Ratan Garg under a perpetual sub- lease deed dated 22.11.1975 issued by the Delhi Administration, converted to freehold by Conveyance Deed executed in the year 2000. These facts are common ground. Late Sh. Ram Ratan Garg died on 26.11.2007, leaving his widow, Smt. Maya Devi, who expired on 14.06.2020, leaving behind three sons one of them being Sh. Anil Kumar Garg, the husband of plaintiff no. 1, and the defendant nos.1 and 2 as also a daughter (defendant no.3). Thus, the plaintiffs are the widow and two children of Late Sh. Anil Kumar Garg who died on 30.11.2020.

4. The plaintiffs' case is that both Sh. Ram Ratan Garg and Smt. Maya Devi died intestate so that the suit property devolved in four equal shares on the Class-I heirs under Section 8 of the Hindu Succession Act, 1956 and that that plaintiffs together are entitled to one-fourth share of their predecessor in interest. They seek declaration, partition, possession and permanent injunction.

5. The defendants in their joint written statement rely on a registered Will dated 24.04.2001 attributed to Sh. Ram Ratan Garg, bequeathing the property to Smt. Maya Devi and a registered Will dated 20.12.2017 attributed to Smt. Maya Devi bequeathing the said property to defendant nos.1 and 2 in equal shares.

6. It is the case of the plaintiff no. 1 that she came to know of the Wills soon after the death of her husband from one of the defendants.



7. One of the prayers sought by the plaintiffs is that Wills be declared null, void, forged and not binding on them.

8. By order 02.04.2024, this Court framed the following issues:

“a. Whether the deceased, Ram Ratan Garg, had validly executed a Will dated 24.04.2001 in sound, disposing mind and health? OPD

b. Whether the deceased, Smt. Maya Devi, had validly executed Will dated 20.12.2017 in sound disposing mind and health? OPD

c. Whether the plaintiffs are entitled to 1/4th share in the suit property bearing No.B-268, Saraswati Vihar, Pitampura, Delhi-34? OPP

d. Whether the plaintiff is entitled for declaration, partition, and permanent injunction of the suit property bearing No.B-268, Saraswati Vihar, Pitampura, Delhi-34? OPP

e. Relief.

f. No other issues arose or pressed for.”

9. The parties could not agree before the Local Commissioner as to the sequence of leading evidence and the question was referred by this Court to the learned Joint Registrar who has passed the impugned order.

The impugned order

10. The learned Joint Registrar has reasoned in substance that:

(i) Order XVIII Rule 1 of the CPC gives the plaintiff the right to begin, unless the defendant admits the plaintiff's facts and sets up additional facts or law.

(ii) The right to begin is guided by the pleadings and the relief sought rather than the burden of the proof in the abstract.

(iii) In Delhi, a Will need not be probated so that a defendant may rely on an unprobated Will as a defence and the Civil Court may test it in the



suit.

(iv) Since the plaintiffs have sought a substantial declaration that the Wills are null and void, the initial onus to prove entitlement of the declaration sought lies upon the plaintiffs.

(v) The plaintiffs' allegation of forgery and fabrication must be affirmatively proved by them.

(vi) The defendants' burden to prove the Wills would arrive substantially in the rebuttal.

11. Mr. Rajat Aneja, learned senior counsel for the plaintiffs submits that the defendants entire case rests on the two Wills and that if the Wills are proved in accordance with Section 63 of the Indian Succession Act, 1925 read with Section 67 of the Bharatiya Sakshya Adhiniyam (BSA), 2023 (Section 68 of the Indian Evidence Act, 1872), the controversy in the suit would stand substantially resolved. He submits that this Court has consistently held that where the defendant's case, if proved would virtually decide the suit, the defendant may be directed to lead evidence first. In this regard he relies upon judgments/orders of **Poonam Bhanot vs. Virender Sharma and Ors.**, 2022 SCC OnLine Del 2156; **Achala Mohan vs. Jayashree Singh**, 2020 SCC OnLine Del 2538 and **Deepika Talwar vs. Shalini Chaudhary Sharma & Ors.**, passed by this Court in CS(OS) 110/2016 on 30.01.2017. He further submits that the onus of proving due execution of Wills and dispelling suspicious circumstances lies on the propounder. He emphasizes that the issues framed on 02.04.2024 themselves cast the onus of issues A and B on the defendants.

12. Learned senior counsel also refers to certain other judgments; **Jaswant**



Kaur vs Amrit Kaur AIR 1977 SC 74, **H.Venkatachala Iyengar v. B.N. Thimmajamma** AIR 1959 SC 443, **Kavita Kanwar v. Mrs Pamela Mehta & Ors.**, (2021) 11 SCC 209, **Meena Pradhan & Ors. v. Kamla Pradhan & Anr.**, (2023) 9 SCC 734, **Vikram Kaushik & Anr. Vs Vivek Kaushik** 2011 SCC OnLine Del 5335.

13. Learned counsel for the defendants submits that Order XVIII Rule 1 of the CPC is conjunctive. The defendant must both admit the plaintiff's facts and plead additional facts or law, only then does the right to begin pass on to him. He submits that the defendants have not admitted the plaintiffs' material facts. It is submitted that all of the said facts have been denied in the written statement. Hence, the first condition fails, and the plaintiffs must begin under the general rule.

14. The defendants rely upon the judgments in the case of **Om Prakash vs. Amit Chaudhary & Ors.**, 2019:DHC:3605 and **Meena Pradhan & Ors. vs. Kamla Pradhan**, (2023) 9 SCC.

Reasoning

15. Order XVIII Rule 1 reads as under:

"1. Right to begin.—The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin."

16. It is well-settled that the rule enshrined in Order XVIII Rule 1 of the CPC, must be read with the issues as framed, and the onus actually cast.

17. The Supreme Court in **Jami Venkata Suryaprabha and Another Vs Tarini Prasad Nayak and Others** 2024 SCC OnLine SC 3862 has held that



Order XVIII Rule 1 of the CPC provides for the plaintiffs 'right to begin' but it is not an obligation on the Court, always to call upon the plaintiff first, the Court may call upon either party depending upon the facts and issues framed and where the defendant's pleas strikes at the roots of the controversy, there is no impediment in asking the defendant to adduce evidence first. The Court noted that: -

“18. Order XVIII Rule 1 indeed provides for plaintiff's right to begin the evidence but not the court's obligation to ask the plaintiffs to begin first. There is no impediment for the court to call upon either party to lead evidence first, depending upon the facts and circumstances of the case and the nature of the issues framed. Neither party can insist that the other one should be asked to lead it first. It all depends upon what the Court deems proper in the circumstances. Where it finds that defendant's plea strikes of the root of the case, there would be no hitch in asking him/her to prove such plea first which can lead to disposal of the case. There can be no watertight compartmentalisation in matters of justice and all rules of procedure are designed and directed to achieve and secure ends of justice.”

18. It is also well-settled in the judgments/orders in **Poonam Bhanot, Achala Mohan and Deepika Talwar** (supra) that if the defendant sets up a case, the proving of which would substantially decide the issues which have been raised in the suit itself, then the defendant can be called upon to lead evidence first. Reference may be made to the following observations in **Poonam Bhanot vs. Virender Sharma and Ors.-**

“23. In view of the aforesaid, it is clear that the defendants have set up a case, which if proved, would decide the issues raised in the suit itself. The present suit is a suit for partition filed by one of the sisters. The defendant no. 1 being the brother has denied the share of the plaintiff as well as other defendants who are his sisters on the basis of an unregistered Will dated 12.07.2016. If the defendant no. 1 proves his case regarding the execution of unregistered Will dated 12.07.2016 by the father of the parties, by which properties have been bequeathed in his



name, then the case of the plaintiff for partition of suit properties in her favour, would be completely demolished.

24. Likewise, if the defendant nos. 2 to 4, the sisters of plaintiff and defendant no. 1, are able to prove that the registered Will dated 05.09.2014 was the last Will of their father and that he had not executed any other Will after the registered Will dated 05.09.2014, then also the issues raised in the suit will be decided. In case it is proved that the registered Will dated 05.09.2014 was the last and final Will executed by the father of the parties, then the plaintiff will get her share in the property as per the bequeathment in the said Will dated 05.09.2014.

25. Thus, in view of the aforesaid, it is clear that if the defendants are able to prove the issues no. 1 and 2 with respect to which the onus is on defendant no. 1 and defendant no. 3 respectively, then it will facilitate and streamline the whole trial and also shorten the litigation. If the defendant no. 1 is successful in discharging the onus that Will dated 12.07.2016 was the last Will executed by the father of the parties, then the suit of the plaintiff is bound to fail and she will not be entitled to any relief. Likewise, if defendant no. 3 is able to prove that the father of the parties validly and legally executed his last Will dated 05.09.2014, by which all the parties were endowed with certain shares in the suit properties, then also the whole case will be decided accordingly. There would be no necessity to delve in the further aspects of the matter. Accordingly, it will be in the fitness of things if the defendants are directed to lead evidence first on the issues qua which onus is cast upon them.

26. A Coordinate Bench of this Court in the case of Achala Mohan v. Jayashree Singh, reported as CM(M) No. 255 of 2020, order dated 26-2-2020 (Del) has held as follows:—

“19. Thus, the consistent view has been that if the Defendant sets up a case, the proving of which, would completely decide the issues which have been raised in the suit itself, then the Defendant under Order XVIII Rule 1 CPC can be directed to lead evidence first.

.....

25. The ld. counsel for the Defendant submits that unless and until the Defendant voluntarily opts for leading evidence first, the Court would not have the power to direct so. This would not be in accordance with



law inasmuch as the Court has the power to curtail the trial of any suit at the time of framing of issues. The manner in which the issues have been framed in the present case shows that insofar as the issue no. 1 and issue no. 2, the onus has been cast clearly on the Defendant. If the Defendant is able to prove or not prove these issues, the decision in the suit would get quite expedited.

26. Under these circumstances, it is not necessary that in every suit, unless and until, the Defendant opts, the Court cannot direct the Defendant to lead evidence first. The question as to whether who should lead evidence first, would have to be decided by the Court after ascertaining the respective stands of the parties and after seeing as to what are the actual issues which arise for adjudication in the suit itself.”

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29. Keeping in the mind the aforesaid discussion, the unequivocal position that emerges is that if the defendants set up a case, which if decided, would decide the issues raised in the suit completely, then the defendants can be directed to lead evidence first under Order 18 Rule 1 CPC.”

19. The facts of **Poonam Bhanot vs. Virender Sharma and Ors.** (supra), have an uncanny similarity with the facts of the present case. In that case, the plaintiff daughter pleaded intestacy and the defendant set up competing wills. It was in this context that the observations were made in para-23 to 25 therein that the defendants had set up a case which if proved would decide the issues raised in the suit itself and that if the defendant prove the Will, the partition claim ‘*would be completely demolished*’ and that where the onus of the Will issues is on the defendants, it will be in the fitness of things if the defendants are directed to lead evidence first on the issues qua which the onus is cast on them. The defendant there had likewise opposed the application on the footing that the plaintiff’s claim was not admitted (para-14). The said objection did not prevail.



20. It has been seen that the issue Nos. A and B, framed in the present case clearly cast the onus of proof on the defendants to prove the Wills in question.

21. The legal position is also well-settled that under Section 63 of the Indian Succession Act, 1925 read with Section 67 of The Bharatiya Sakshya Adhiniyam, 2023, a Will cannot be used in evidence unless atleast one attesting witness is examined to prove its execution and the proviso exempting registered documents from that requirement expressly excludes Wills.

22. It has been reiterated time and again that the onus lies on a propounder to satisfy the Court that the instrument is the last Will of a free and capable testator and where suspicious circumstances exist, to dispel them. The observations in this regard in **H. Venkatachala Iyengar vs. B. N. Thimmajamma and Ors.**, 1958 SCC OnLine SC 31 are as under:

“19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.”



23. The same has been observed by the Supreme Court in **Kavita Kanwar Vs. Mrs. Pamela Mehta & Ors.** (2021) 11 SCC 209 wherein his court has reiterated the principles governing the adjudicatory process concerning proof of a will as follows:-

“24.8. We need not multiply the references to all and other decisions cited at the Bar, which essentially proceed on the aforesaid principles while applying the same in the given set of facts and circumstances. Suffice would be to point out that in a recent decision in Shivakumar v. Sharanabasappa], this Court, after traversing through the relevant decisions, has summarised the principles governing the adjudicatory process concerning proof of a will as follows:

“12. ... 12.1. Ordinarily, a will has to be proved like any other document; the test to be applied being the usual test of the satisfaction of the prudent mind. Alike the principles governing the proof of other documents, in the case of will too, the proof with mathematical accuracy is not to be insisted upon.

12.2. Since as per Section 63 of the Succession Act, a will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.

12.3. The unique feature of a will is that it speaks from the death of the testator and, therefore, the maker thereof is not available for deposing about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last will of the testator. The initial onus, naturally, lies on the propounder but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a will.

12.4. The case in which the execution of the will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus heavier on the propounder and, therefore, in cases where the circumstances attendant upon the execution of the document give rise to suspicion, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

12.5. If a person challenging the will alleges fabrication or alleges fraud, undue influence, coercion et cetera in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may give rise to the doubt or as to whether the will had indeed been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.....”



24. Further, Section 104 of the Bharatiya Sakshya Adhiniyam, 2023 (corresponding to Section 101 of the Indian Evidence Act, 1872) requires a party who desires the Court to give judgment as to any legal right dependent on the existence of facts which he asserts, to prove that those facts exist; and Section 105 (corresponding to Section 102) places the burden of proof in a suit or proceeding on that person who would fail if no evidence at all were given on either side. The defendants, being the propounders of the two Wills, are the parties who assert the existence, due execution and validity of those instruments. In the present suit, if no evidence at all were led on either side, the two Wills would remain unproved, and succession to the property of Late Sh. Ram Ratan Garg would necessarily be governed by the law of intestate succession. It is, therefore, the defendants and not the plaintiffs who would fail.

25. As regards the defendants' objections that they had denied the material facts, asserted in the plaint, it is noticed that no issue with regard thereto has been framed.

26. The facts on which the framed issues essentially turn, is the validity of the two wills set out by the defendants. The other relevant facts viz. the date of death, the relationship of the parties as Class-1 heirs and the existence and registration of the two Wills are admitted.

27. In the context of the peculiar facts of the present case, it would not be apposite to require the plaintiff to adduce evidence on aspects which are not even within the scope of controversy in the present suit.

28. As noticed, the primary controversy is as regards the validity of the Will set up by the defendants. It would be futile to call upon the plaintiff to step into the witness box to prove a negative.



29. It is also noticed that the defendants do not merely admit the existence, they go on to affirmatively plead and rely on the Wills as genuine, duly executed and registered instruments under which title validly passes. This can, in a sense, be considered to be an ‘additional fact’, which if proved, would disentitle the plaintiff to any part of the relief which it claims.

30. This is particularly so, in the light of the well-settled position that with regard to self-acquired property, upon death of owner the owner, the intestacy of the owner thereof would conclude the issue as regards the issue of Succession, unless a defence of testamentary succession is made out.

31. The prayer for a declaration that the Wills are null and void is not an independent cause of action requiring separate proof, it is a mirror image of issue Nos. A and B and is consequential upon their answer. If the propounder has failed to prove valid execution, the declaration follows without any further proof by the plaintiff. This is why **Poonam Bhanot vs. Virender Sharma and Ors.**, and **Achala Mohan vs. Jayashree Singh (Supra)** reached the conclusion that they did.

32. The impugned order treats the fact that the probate is not compulsory in Delhi as supporting the retention of the general Rule set out in Order XVIII Rule 1 CPC. The same does not appeal to reason.

33. Whether a Will must be probated before it can be relied upon is unrelated as to how a Will once relied upon in a suit must be proved. The absence of probate requirement means only that the Civil Court will itself examine the Will. It says nothing about which party must prove it and it certainly does not relieve the propounder of the mandatory requirement of examining an attesting witness.



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34. The impugned order does not refer to the issues framed on 02.04.2024, to the onus cast by them and the implications flowing therefrom.

35. In the circumstances, the present OA is allowed.

36. The order dated 26.02.2026 is set aside.

37. It is directed that the defendants shall lead evidence first before the Local Commissioner on issue Nos. A and B and on such other issues as they may choose. The plaintiffs shall thereafter lead the evidence including evidence in rebuttal.

38. Needless to say, if the issue Nos. A and B are decided in favour of the defendants, the same would be substantially dispositive of the controversy involved in the suit.

39. The appeal is disposed of in the above terms.

IA No. 10834/2026 (filed on b/o plaintiff seeking stay to the proceedings before LC)

40. In view of the order passed in O.A. 94/2026, the present application stands infructuous.

41. Accordingly, the present application stands disposed of.

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42. List before the concerned Joint Registrar (Judicial) for fixing of a schedule for recording of evidence before Local Commissioner on 15.09.2026.

SACHIN DATTA, J

SEPTEMBER 2, 2026/cl