



2025:DHC:1499



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

*Pronounced on: 07.03.2025*

+ CS(OS) 677/2024

SAMIR SHARMA

.....Plaintiff

Through: Mr. Shaunak Kashyap, Ms. Parul Tuli, Ms. Nistha Gupta and Mr. Ahmar Shad, Advs.

versus

STERRE SHARMA & ANR.

.....Defendants

Through: Mr. Rajat Wadhwa, Mr. Amulya Dhingra, Mr. Gurpreet Singh and Ms. Divya Kanwar, Advs. for D-1

**CORAM:**

**HON'BLE MR. JUSTICE VIKAS MAHAJAN**

**JUDGMENT**

**VIKAS MAHAJAN, J.**

**I.A. 37440/2024 (filed by plaintiff under Order XXXIX Rule 1 & 2 read with Section 151 CPC for grant of *ad-interim ex-parte* injunction)**

1. With the consent of the parties the present application is taken up for disposal.
2. The present suit has been filed seeking partition, rendition of accounts and injunction of the estate left behind by late Capt. Satish Sharma. The plaintiff is the son whereas the defendant nos.1 & 2 are wife and daughter of late Capt. Satish Sharma.
3. Along with the present suit, plaintiff has also filed the present application for *ad interim ex-parte* injunction praying for restricting the



defendants from creating any third-party interest in immovable properties mentioned in Schedule-A to the plaint.

4. Mr. Shaunak Kashyap, the learned counsel appearing on behalf of the plaintiff submits that the assets which form part of the estate of late Capt. Satish Sharma have been enumerated in Schedule-A to the plaint and one of the contentious properties is agricultural land.

5. He submits that the present suit has been filed by the plaintiff on the ground that late Capt. Satish Sharma passed away intestate and the plaintiff being class I legal heir is a co-owner in all the properties mentioned in Schedule-A.

6. He submits that plaintiff is residing in property bearing nos. 28 and 30 Dera Mandi Road, New Delhi and eviction notice was served upon him by defendant no.1 on 09.09.2022. Subsequently, another notice was served upon the plaintiff on 12.07.2024 asking him to evict premises by December 2024.

7. He submits that prior to filing of the present suit a probate petition has been filed in this Court by the defendant no.1 being TEST CAS. 60/2021 titled "*Sterre Sharma Vs State Govt of NCT & Ors*" with regard to registered Will dated 19.06.2018 allegedly executed by late Capt. Satish Sharma in favour of defendant no.1 and disinheriting plaintiff and defendant no.2.

8. He further submits that since the defendant no.1 has also filed a probate petition with regard to the said Will, therefore, the entire estate of late Capt. Satish Sharma needs to be preserved.

9. He submits that in any case, the plaintiff has filed his objections in the TEST. CAS. 60/2021 with regard to the validity of the Will *inter alia* on the



ground that late Capt. Satish Sharma was suffering from Cancer which had metastasized to his brain, therefore, he was not in a fit state of mind to execute the Will. He submits that the objections are still pending consideration before this Court.

10. On the other hand, Mr. Rajat Wadhwa, the learned counsel appearing on behalf of defendant no.1 submits that the present suit is not maintainable inasmuch as no prayer seeking declaration that the Will is illegal, null and void has been sought in the present suit. He submits that the prayer for declaration has deliberately not been sought in the present suit inasmuch as the said prayer would have been barred by limitation. In addition, he submits that the probate petition in the present case was filed as early as on 06.07.2021 whereas the present suit came to be filed only in August, 2024 which is clearly barred by limitation.

11. He submits that since there exists a registered Will in favour of the defendant no.1, therefore, the *prima facie* case is not in favour of the plaintiff.

12. He further submits that since the plaintiff has indulged into forum shopping, therefore, for this reason too, the plaintiff is not entitled to interim relief.

13. Elaborating further, he submits that prior to filing of present suit, another suit being CS (SCJ) No. 941/2023 was also filed by the plaintiff before the Court of learned Additional District Judge, Saket. In the said suit, the plaintiff had also filed an application seeking interim relief in terms of Order XXXIX Rules 1 & 2 CPC, however, no interim relief was granted.

14. He further contends that the suit is barred under order II Rule 2 CPC. He, however, fairly states that during pendency of the said suit the present



suit was filed by the plaintiff and the suit at Saket Court was withdrawn subsequently with liberty to prosecute the present suit, which was granted.

15. He further submits that the wife of the plaintiff had also filed a complaint case being CC No. 1573/2022 under the Protection of Women from Domestic Violence Act, 2005 ('Act') wherein similar relief of *status quo* in respect of one of the suit properties which is a residential house at Dera Mandi was also sought. In the said proceedings also, no interim relief has till date been granted.

16. In the backdrop of aforesaid facts, Mr. Wadhwa urges the Court that the plaintiff is not entitled to any relief in the present suit either.

17. He places reliance on the decision of Hon'ble Supreme Court in *Asma Lateef and Another vs. Shabbir Ahmad and Others. (2024) 4 SCC 696* to contend that even for granting an interim relief the Court is ought to first decide the issue with regard to maintainability. He also places reliance on the decision of *Surinder Kaur vs. Ram Narula & Others., 2013 SCC OnLine Del 4377* to contend that the relief of declaration is *sine qua non* for maintainability of the present suit.

18. Likewise, reliance has also been placed on the decision of *Black Diamond Track Parts Private Limited and Others vs. Black Diamond Motors Private Limited, 2021 SCC OnLine Del 2630* to contend that forum shopping is not permissible.

19. He further places reliance on the decision of the Hon'ble Supreme Court in *Chiranjilal Shrilal Goenka (deceased) through LRs vs. Jasjit Singh and others, (1993) 2 SCC 507*, in support of his contention that the issue with regard to the validity of Will is in the exclusive domain of the Probate Court especially when the probate has been filed. Therefore, no



issue with regard to the validity and legality of the Will can be framed in partition suit nor interim relief in respect of the estate of testator can be granted.

20. On the other hand, Mr. Kashyap has placed reliance on the decision of *Dev Raj Chaudhry vs. Raj Kumar and Others, 2024 SCC OnLine Del 2997* to contend that not seeking declaratory relief with regard to the Will when the probate petition is already pending is not fatal for the suit. Likewise, reliance has also been placed by him on *Amar Deep Singh vs. State & Ors., 2005 (85) DRJ 179*, in support of his submission that once a probate Court is considering a petition for grant of probate or Letters of Administration in respect of a Will, that Court alone is competent to decide on the question of execution and/or validity or otherwise of Will in question.

21. Mr. Kashyap also controverts the submission of Mr. Wadhwa on the aspect of limitation by submitting that right to partition is a perpetual right unless satisfied by a decree. He further submits that joint ownership itself creates perpetual right to partition which does not lapse with time. In support of his submission, he has placed reliance on the two decisions of the Hon'ble Supreme Court – (i) *Vidya Devi alias Vidya Vati (dead) by LRs vs. Prem Prakash and Others, (1995) 4 SCC 496* and (ii) *Shubh Karan Bubna alias Shub Karan Prasad Bubna vs. Sita Saran Bubna and Others, (2009) 9 SCC 689*.

22. I have heard the learned counsel for the parties and have also gone through the material on record.

23. As noted above, the plaintiff is the son whereas the defendant nos.1 and 2 are wife and daughter, respectively of Late Captain Satish Sharma. The suit has been filed by the plaintiff seeking partition, rendition of



accounts and injunction of properties forming part of the estate of Late Captain Satish Sharma, alleging that Late Captain Satish Sharma passed away intestate, however, the defendant no.1 is claiming that Late Captain Satish Sharma had executed a registered Will dated 19.06.2018 in her favour, thereby disinheriting the plaintiff and defendant no.2.

24. The properties which form part of the suit have been enumerated in Schedule 'A' to the plaint. It appears that all the said properties are also subject matter of the aforesaid Will dated 19.06.2018.

25. It is not in controversy that the defendant no.1 has filed a TEST CASE 60/2021 seeking probate of the aforesaid Will, which was filed on 15.07.2021, whereas the present suit was filed by the plaintiff in August 2024 praying *inter alia* for the partition of suit properties. In the suit, the prayer made is only for partition, rendition of accounts and permanent injunction in respect of the suit properties. No relief of declaration to the effect that Will dated 19.06.2018 is null and void has been sought in the present suit. It is in this backdrop, Mr. Wadhwa has argued that since there is no prayer seeking such declaration, therefore, the suit is not maintainable.

26. The above contention of Mr. Wadhwa need not detain this court any longer, inasmuch as, the law is well settled that the probate court alone has the exclusive jurisdiction to adjudicate upon proof or validity of the Will. In other words, the functions of the probate court are to see that the Will was executed by the testator and that too in a sound disposing state of mind without coercion or undue influence and the same is duly attested by two witnesses. The probate court is, however, not competent to determine the question of title to the suit properties. Reference in this regard may be had to the decision of the Hon'ble Supreme Court in ***Kanwarjit Singh Dhillon vs.***



***Hardyal Singh Dhillon and Others., (2007) 11 SCC 357.***

27. Further, it is no more *res integra* that probate proceedings and the partition suit, being distinct proceedings, can go simultaneously. It was so held by a coordinate bench of this court in ***Dev Raj Chaudhry*** (supra).

28. Likewise, in ***Satula Devi v. Rajeev Sharma & Others., 2023 SCC OnLine Del 2066***, one of the prayers sought in the plaint was for a decree declaring the Will in question as null and void. The objection taken by the learned counsel for the defendants therein was that the prayer cannot be granted by the Civil Court as the validity of Will can only be a subject matter of the probate proceedings initiated by the defendant no.2 therein, which was pending consideration. This Court observed that the declaration to the effect that the Will is null and void cannot be granted without there being a decision on the validity of a Will that has been propounded before a Probate Court. It is only after the decision on the validity of the Will by the Probate Court that the same can be admitted into evidence and can be taken into consideration by the Civil Court while deciding the suit for title. It was further held that the validity of Will has to be decided by the probate court, therefore, the same prayer sought in the suit shall not be maintainable. The relevant part of the said decision reads as under:

***“97. This submission of Mr. Sethi and Mr. Nayar is answered by Mr. Vikas Singh by relying on paragraph 15 of the judgment in the case of Chiranjilal Shrilal Goenka (deceased, through LRs.) (supra) by stating that Probate Court cannot decide the question of title qua the property mentioned in the Will dated July 18, 2011 and it is only the Civil Court which can decide the same. There cannot be any dispute on the afore-said proposition of law but at the same time, the declaration sought that the Will dated July 18, 2011, be declared as null and void, cannot be decided without there being a decision on the validity of that Will***



***propounded by the defendant No. 2. It is only thereafter that the decision on the validity of the Will by the Probate Court can be admitted into evidence and can be taken into consideration by the Civil Court while deciding the suit for title as the grant of probate may not be decisive for declaration of title. [Ref : Kanwarjit Singh Dhillon (supra)]. Still the issue of validity of Will has to be decided by the Probate Court and it is precisely the prayer at 'b' of the plaint. So, additionally, the prayer 'b' of the suit shall not be maintainable before this Court exercising the original civil jurisdiction."***

(emphasis supplied)

29. In view of the above, the legal position that emerges is that the probate proceedings and partition suit can go simultaneously, but once a petition has been filed seeking a probate with regard to a Will, the prayer for declaring the said Will as null and void shall not be maintainable in a suit for partition. Thus, there is no merit in the submission of Mr. Wadhwa that the suit of the plaintiff, in the absence of prayer seeking such a declaration is not maintainable.

30. Reliance placed by Mr. Wadhwa on the decision of *Surinder Kaur (supra)* will not aid the case of the defendant no.1, inasmuch as, in the said case, what weighed with this Court was the fact that on the basis of the Will of the testatrix, the defendant no.1 therein had got the mutation of the suit property sanctioned in his favour and subsequently, further rights had been created by way of several sale transactions. In this factual backdrop, it was observed that despite the plaintiff having knowledge of the mutation and even after amendment to the plaint regarding the subsequent sale deeds, the plaintiff had not sought declaration and cancellation of such documents which was held to be fatal to the suit therein. The present is not a case where the Will dated 19.06.2018 has been acted upon and any third-party rights



have been created, that would require the plaintiff to seek declaration with regard to the documents creating such third-party rights.

31. Insofar as the submissions of Mr. Wadhwa, that the suit is barred under Order II Rule 2 CPC as the plaintiff had earlier filed a suit and further that the plaintiff is resorting to forum shopping as similar interim relief was sought in said earlier suit as well as in the probate petition, it may be noticed that the earlier suit i.e. CS (SCJ) 941/2023 had been filed by the plaintiff praying, *inter-alia*, for injunction against the defendant no.1 herein from adding any moveable or immovable assets of late Capt. Satish Sharma into the corpus of family trust namely, '*Satish and Sterre Sharma Family Trust*'. Incidentally, the said relief has not been sought in the instant suit and the subject matter of the said suit is also different from the present suit in which the relief sought is essentially for partition.

32. That apart, the said earlier suit now stands withdrawn with liberty to pursue appropriate legal remedy. The cause of action in both the suits being different, the bar under Order II Rule 2 CPC does not get attracted nor it can be said that the plaintiff by filing the present suit in which the relief sought is for partition and other incidental reliefs, is resorting to forum shopping.

33. Even otherwise, it is well settled that a suit which has been permitted to be withdrawn at a stage much before any issue is framed can hardly be said to be a suit finally heard and decided by a court and the principles governing Order II Rule 2 CPC would also not bar the subsequent suit. In this regard reference may be had to a decision of a co-ordinate bench of this Court in *Vakil Chand Jain vs. Prakash Chand Jain*<sup>1</sup> wherein it was held as under:



*“28. The rationale behind Order II Rule 2 CPC also appears to have an apparent linkage with the principles on which Section 11 CPC operates. The principles could be either of res judicata itself or of constructive res judicata. For both these principles to be attracted, the issue that arises substantially in a suit will have to be heard finally and decided by a court. Even if one were to accept the submissions of Mr. Jain, learned Senior counsel for the Defendant, that it is not necessary that the Court should frame an issue which is “directly or substantially an issue”, the requirement of Section 11 CPC is that such issue should have “been heard and finally decided by such court.” A suit which has been permitted to be withdrawn at a stage much before any issue is framed, can hardly be said to be a suit finally heard and decided by a court. Even factually in the present case a perusal of the order dated 18<sup>th</sup> May 2001 in Suit No. 204 of 2000 shows that the suit has hardly progressed. Soon after the written statement was filed, the Plaintiff realised that the court of the learned ADJ lacked the jurisdiction to try the suit. In those circumstances, the Plaintiff applied to withdraw the suit reserving the liberty to file a fresh suit. **In the considered view of this Court, neither the principle of constructive res judicata nor res judicata is attracted to the present case. The principles governing Order II Rule 2 CPC would also not bar the Plaintiff in the present case from claiming the relief of declaration or injunction in addition to the relief of partition.**”*

(emphasis supplied)

34. Also to be noted that an application seeking interlocutory relief in the form of an interim injunction in a probate petition is not maintainable in view of the bar contained in sub-section (2) of Section 269 of Indian Succession Act, as the said provision specifically restricts the Probate Court from protecting the property which is a subject matter of a Will, where the deceased is a Hindu, Mohammedan, Buddhist Sikh or Jaina. Reference in this regard may be had to the decision of the Coordinate Bench of this Court

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<sup>1</sup> 2009 SCC OnLine Del 2769.



in *Fauzia Sultana vs. State and Another*<sup>2</sup> wherein relying upon an earlier decision of the Coordinate Bench of this Court in *Ajay Malhotra vs. State*<sup>3</sup> as well as on a decision of the Division Bench of the Bombay High Court in *Ramchandra Ganpatrao Hande alias Handeje vs. Vithalrao Hande and others*<sup>4</sup>, it held as under:

**52. In fact, I find that the Coordinate Bench of this Court in the case of *Ajay Malhotra v. State*, Test Cas. 37/2018 decided on May 15, 2019, while considering an application under Order XXXIX Rule 1 and 2 read with Section 151 CPC, 1908, filed in a probate petition seeking probate of Will dated October 26, 2017, wherein the petitioner had sought an interim injunction against respondent Nos. 2 and 3 therein, restraining them from selling, alienating, transferring or creating any third party rights or interest in respect of any of the immovable properties bequeathed in favour of the petitioner therein, under a document dated October 26, 2017, purporting to be the Will and testament of the deceased testator, had dismissed the same. While interpreting the provisions of Section 269(2) of the Indian Succession Act, 1925, this Court, held that the said sub-section, specifically restricts the application of Section 269(1), if the probate is sought of the Will of the deceased person who was Hindu, Muhammadan, Buddhist, Sikh or Jaina. This Court while holding that such an Application, as not maintainable, has held, as under:**

“ .....

**15. It is also to be noticed that section 269 of the Act reads as under:**

“269. When and how District Judge to interfere for protection of property.-

(1) Until probate is granted of the will of a deceased person, or an administrator of his estate is constituted, the District Judge, within whose jurisdiction any part of

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<sup>2</sup> 2022 SCC OnLine Del 3583.

<sup>3</sup> 2019 SCC OnLine Del 8505.

<sup>4</sup> 2011 SCC OnLine Bom 440.



*the property of the deceased person is situate, is authorised and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he thinks fit, to appoint an officer to take and keep possession of the property.*

*(2) This section shall not apply when the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nor shall it apply to any part of the property of an Indian Christian who has died intestate.”*

***The said provision also empowers the Court to pass orders for the protection of the property of the deceased person. Sub-section (2) of section 269 specifically restricts the application of the said provision where the deceased is a Hindu, Mohammedan, Sikh or Jaina. Admittedly, the deceased here is a Hindu and therefore, not entitled to invoke section 269. The fact that the legislature has restricted the application of section 269, to certain category of persons, clearly indicates by implication that the legislature never intended to confer such power on the testamentary court to give interim directions in relation to the persons covered under section 269(2) of the Act.***

*16. No doubt this Court in Kulbir Singh v. State (1993) 52 DLT 57 has held that the Court has the power to grant injunction exercising its inherent powers, however, the facts of the said case are distinguishable and in that case, section 269(2) was not brought to the notice of the Court in the said judgment.....*

***53. In fact, I find that the Division Bench of the Bombay High Court clearly held that the effect of Sub-Section (2) of Section 269 of the Indian Succession Act, 1925, is to preclude exercise of power in case of one of the excepted categories. It went on to hold that it would not be permissible, in the face of the specific provision of sub-section (2) of Section 269, to read into the provisions of Sections 266 and 268 of the Indian Succession Act, 1925, a general***



***power to grant interlocutory relief, even prior to the grant of probate in respect of the property which is alleged to form part of the estate of the deceased. In the case in hand, the deceased being a Muhammadan, the bar under Section 269(2) shall come into play.***

*54. Suffice to state that the Coordinate Bench of this Court in Ajay Malhotra (supra), has clearly held by referring to the judgment of Shri Kulbir Singh (supra), that the latter judgment is distinguishable, as Section 269(2) of the Indian Succession Act, 1925, was not brought to the notice of this Court in the said judgment.*

***55. I agree with the above conclusion of the Coordinate Bench of this Court and the law having been settled in terms of the judgment of the Division Bench of the Bombay High Court, this Court is of the view that the present application filed by the petitioner for the prayers, as already noted above, shall not be maintainable in these proceedings and as such, the same is dismissed.***

*(emphasis supplied)*

35. To drive home his point of forum shopping, Mr. Wadhwa has also urged that relief of injunction had been sought by the wife of the plaintiff as well, by filing a complaint under the Act being CC No.1573/2022. Suffice it to observe that the said petition was filed by the wife of the petitioner claiming her right to stay in a 'shared household' in view of the statutory provision under the Act, thus, the same cannot come in the way of the plaintiff seeking partition in respect of the estate of his late father and consequent interim relief in respect thereof, being a class I legal heir nor filing of the present suit by the plaintiff on a separate cause of action can be termed as forum shopping.

36. Next argument of Mr. Wadhwa that the relief seeking declaration *qua* the Will has deliberately not been sought by the plaintiff as the same is barred by limitation, is equally untenable. In the foregoing paragraphs, it has already been held that relief seeking declaration to the effect that a Will



is null and void is not maintainable in a civil suit for title or partition when a petition seeking probate with regard to the same Will is pending, as the issue with regard to the validity of the Will is to be adjudicated in the probate petition. If the prayer seeking such a declaration itself is not maintainable, the objection as to the same being barred by limitation would pale into insignificance.

37. In so far as limitation period for a suit for partition is concerned, it is trite that no period of limitation has been prescribed therefor and there is always a running cause of action for seeking partition by one of the co-sharers. However, the limitation for suit for partition would be governed by Article 65 of the Limitation Act only when a co-sharer or joint owner in possession of the property, professes a hostile title as against the other co-sharers openly and to the knowledge of the other co-owners, in which case the limitation period will be 12 years from the date when possession of a co-sharer becomes adverse to that of other co-sharers. The reference in this regard may be had to the decision of the Hon'ble Supreme Court in *Vidya Devi (supra)*, wherein it was observed thus:

***“20. The legislature has not prescribed any period of limitation for filing a suit for partition because partition is an incident attached to the property and there is always a running cause of action for seeking partition by one of the co-sharers if and when he decides not to keep his share joint with other to co-sharers. Since the filing of the suit is wholly dependent upon the will of the co-sharer, the period of limitation, specially the date or time from which such period would commence, could not have been possibly provided for by the legislature and, therefore, in this Act also a period of limitation, so far as suits for partition are concerned, has not been prescribed. This, however does not mean that a co-sharer***



*who is arrayed as a defendant in the suit cannot raise the plea of adverse possession against the co-sharer who has come before the court as a plaintiff seeking partition of his share in the joint property.*

*21. Normally, where the property is joint, co-sharers are the representatives of each other. The co-sharer who might be in possession of the joint property shall be deemed to be in possession on behalf of all the co-sharers. As such, it would be difficult to raise the plea of adverse possession by one co-sharer against the other. **But if the co-sharer or the joint owner had been professing hostile title as against other co-sharers openly and to the knowledge of other joint owners, he can, provided the hostile title or possession has continued uninterruptedly for the whole period prescribed for recovery of possession, legitimately acquire title by adverse possession and can plead such title in defence to the claim for partition.***

(emphasis supplied)

38. Now coming to the aspect of *prima facie* case, as noted above, the defendant no.1 has filed a petition seeking probate of the Will of late Capt. Satish Sharma in which the plaintiff has filed objections questioning the legality and validity of the said Will. In the event the defendant no.1 fails to establish the legality and validity of the Will in the pending probate petition, the plaintiff shall automatically be entitled to a definite share in the estate of late Capt. Satish Sharma by virtue of him being class I legal heir. This means, till the time the legality and validity of the Will is not established by grant of probate in favour of the defendant no.1, the claim of the plaintiff to the estate of his late father cannot be ousted. Therefore, as of now, the plaintiff has a *prima facie* case.

39. Further, in the present suit for partition, if the suit properties, which



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are also subject matter of the aforesaid Will, are not prevented from being dissipated by alienation or creation of third-party rights by the defendants, nothing would remain to be partitioned, if the defendant no.1 fails to prove the validity and legality of the Will and the plaintiff eventually succeeds in the present suit. Thus, the balance of convenience lies in favour of the plaintiff. This Court is also of the opinion that the plaintiff will suffer an irreparable loss in case the interim relief is not granted.

40. In view of the above, the present application is allowed. Consequently, the defendants are directed not to sell, alienate, transfer or create any third-party interest in properties as enumerated in Schedule A to the present suit, during the pendency of the present suit.

41. The application is disposed of in the above terms.

**VIKAS MAHAJAN, J.**

**MARCH 07, 2025**  
**N.S. ASWAL**