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Paramjit Kaur and Others Vs. Teja Singh and Others

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Court : Delhi

Decided On : Sep-01-2016

Judge : Valmiki J. Mehta

Appeal No. : RSA No. 143 of 2013 & RSA No. 144 of 2013

Appellant : Paramjit Kaur and Others

Respondent : Teja Singh and Others

Judgement :

Valmiki J. Mehta, J. (Oral)

RSA No. 143/2013

1. Counsels for the parties state that this appeal be disposed of as compromised and appeal would not be pressed on merits inasmuch as, the respondent no.8/Sh. Kimti Lal has agreed to pay a sum of Rs. 4 lacs to the appellants in full and final satisfaction of any claim which the appellants may have in the suit property bearing no. 20/51, First Floor, West Patel Nagar, New Delhi. Accordingly, respondent no.8/Sh. Kimti Lal will pay a sum of Rs.4 lacs to the appellants within a period of eight weeks from today, and on receipt of which amount the rights of the appellants in the property bearing no.20/51, First Floor, West Patel Nagar, New Delhi, as claimed by the appellants would stand satisfied. It is also agreed that in case the amount of Rs.4 lacs as agreed above is not paid by the respondent no.8 to the appellants within a period of eight weeks then respondent no.8 will be liable

to pay interest at the rate of 18% per annum simple on this amount of Rs.4 lacs w.e.f 1.1.2013 till the same is paid to the appellants. It is agreed that the aforesaid amount which is to be paid by the respondent no.8 to the appellants will remain a charge on the suit property bearing no. 20/51, First Floor, West Patel Nagar, New Delhi till the amount is paid. It is also agreed that the amount which is to be paid to the appellants will be paid by means of a pay order or a bank draft drawn in favour of the appellant no.1 and can be delivered either directly to the appellant no.1 or to the appellant no.1 through the counsel for the appellants who is appearing in court today.

2. This second appeal is accordingly disposed of as compromised in the aforesaid terms.

RSA No.144/2013

1(i) This second appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellants/plaintiffs against the impugned Judgment of the First Appellate Court dated 26.2.2013 by which the first appellate court allowed the regular first appeal filed under Section 96 CPC by the respondent nos. 1 to 7 herein and who were the legal representatives of original defendant no.1 Smt. Maan Kaur. Trial court by its Judgment dated 16.7.2003 had decreed the suit of the appellants/plaintiffs declaring that the Relinquishment Deed dated 29.6.1973 executed by the husband of appellant no.1/Sh. Gurcharan Singh (and the father of the other appellants/plaintiffs) with respect to Shop no. 20/45, Old Market, West Patel Nagar, New Delhi is cancelled and that appellants/plaintiffs are entitled to vacant and peaceful possession of the suit property bearing Shop no. 20/45, Old Market, West Patel Nagar, New Delhi. Trial court decreed the suit by the following operative portion of its judgment:-

38. RELIEF:- In the light of my findings, on the issue no.1 to 11 above, the suit of the plaintiffs is decreed against the deft to the effect that plffs are entitled for the declaration to the effect that documents namely relinquishment deed daated 29.6.73 with respect to shop no.45/20 old Market, West Patel Nagar, and sale deed dtd. 2.1.74 with respect to flat no.51/20 Old Market, West Patel Nagar, are cancelled and Gurcharan Singh is declared as original owner of the shop No.45/20

as well as flat no.51/20 situated at Old Market, West Patel Nagar. Plff are also entitled for the vacant and peaceful possession of the suit property comprising of shop No.45/20 and flat no.51/20 as shown in the red colour in the site plan from the deft. No orders as to the cost. Decree sheet be prepared. File be consigned to RR.

(ii) I may clarify at this stage that by the suit declaration and reliefs were sought with respect to two properties, one being the property which is the subject matter of the present decision in RSA No.144/2013 being property no. 20/45, and the other property with respect to which reliefs were sought was property no. 20/51, First Floor, West Patel Nagar, New Delhi, and, with respect to which latter property no.20/51, today vide separate order in RSA No.143/2013 the said dispute is compromised as between the appellants and the defendant no.8/respondent no.8 in the suit namely Sh. Kimti Lal.

2. The First Appellate Court by its impugned Judgment dated 26.2.2013 dismissed the suit and allowed the appeal which was filed by the respondent nos. 1 to 7 herein being RCA No. 7/2008. The operative part of the judgment of the first appellate court is para 58 and which reads as under:-

58. As a result, the suit of the plaintiffs stands dismissed and both the appeals filed by Kimti Lal and LRs of Smt. Mann Kaur stands allowed. The impugned judgment is set aside. Copy of this judgment be placed in both the appeals files. Both the appeal files be consigned to the record room and the Trial Court Record be sent back with a copy of this judgment.

3. The facts of the case are that the appellants are the legal heirs of late Sh. Gurcharan Singh. Sh. Gurcharan Singh is the husband of appellant no.1/plaintiff no.1 and the father of the appellant nos. 2 to 5/plaintiff nos. 2 to 5/daughters. The suit was filed in forma pauperis by the appellants, during the lifetime of Sh. Gurcharan Singh pleading essentially the causes of action in two heads. The first cause of action was that the document being the Relinquishment Deed dated 29.6.1973 executed by Sh. Gurcharan Singh in favour of his sister Smt. Maan Kaur, original defendant no.1 (now represented by her legal heirs/ respondent nos.1 to 7 herein) be cancelled and that it be declared that Sh. Gurcharan Singh

continued to be the owner of the suit shop bearing no. 20/45, Old Market, West Patel Nagar, New Delhi. It was pleaded in the plaint that the Relinquishment Deed dated 29.6.1973 was executed by Sh. Gurcharan Singh in favour of his sister Smt. Maan Kaur was void because Sh. Gurcharan Singh was not in a sound state of mind when he executed the Relinquishment Deed dated 29.6.1973. The cause of action for seeking cancellation of the Relinquishment Deed dated 29.6.1973 was that Sh. Gurcharan Singh had received the suit property bearing no.20/45 by virtue of the registered Will dated 16.7.1971 of his father Sh. Makhan Singh who expired on 18.9.1971, and that as per this Will the suit property was bequeathed in favour of Sh. Gurcharan Singh with a restriction that the property will not be sold/alienated for a period of 10 years after death of Sh. Makhan Singh, and that since the Relinquishment Deed dated 29.6.1973 was executed within 10 years of the Will dated 16.7.1971 becoming operative on the death of Sh. Makhan Singh on 18.9.1971, therefore, the Relinquishment Deed dated 29.6.1973 executed is illegal in view of the violation of the restrictive condition in the Will dated 16.7.1971.

4. It is relevant to note that in the plaint appellants/plaintiffs have stated that the father Sh. Makhan Singh during his lifetime had by a registered Gift Deed dated 4.6.1971 already gifted one immovable property being a house situated in Fateh Nagar, New Delhi to defendant no. 1/Smt. Maan Kaur/sister of Sh. Gurcharan Singh, and who is the predecessor-in-interest of the respondent nos.1 to 7/defendants. In the written statement this aspect is not disputed that Smt. Maan Kaur, defendant no. 1 had in her lifetime received from her father the immovable property being a house situated in Fateh Nagar, New Delhi and of which she was the owner accordingly.

5. Three aspects therefore have to be examined and decided by this Court, and as argued before this Court on behalf of the parties. First aspect is whether late Sh. Makhan Singh had left behind his valid registered Will dated 16.7.1971 in favour of Sh. Gurcharan Singh, predecessor-in-interest of the appellants. The second aspect is that if there exists a valid Will dated 16.7.1971 of Sh. Makhan Singh bequeathing the suit property to Sh. Gurcharan Singh then whether the Relinquishment Deed dated 29.6.1973 executed by Sh. Gurcharan Singh in favour of his sister Smt. Maan Kaur/defendant no.1 is liable to fail on account of violation

of the restrictive condition that the suit property could not be alienated for atleast 10 years after the death of Sh. Makhan Singh who expired on 18.9.1971. The third aspect to be addressed is that what is the effect of the fact that when the subject suit was filed by the appellants, Sh. Gurcharan Singh was alive but he was not made the plaintiff although it is Sh. Gurcharan Singh who owned the suit property, i.e respondent nos. 1 to 7/legal heirs of original defendant no.1 Smt. Maan Kaur pleaded that the suit is bad for nonjoinder of necessary parties on account of non-joinder of Sh. Gurcharan Singh.

6. Let me first turn to the issue as regards whether the Will dated 16.7.1971 by Sh. Makhan Singh bequeathing the suit property in favour of Sh. Gurcharan Singh is proved or not. This was the subject matter of issue no.6 framed by the trial court and which issue no.6 reads as under:-

6. Whether Makhan Singh had duly executed Will dated 16.07.1971? If so to what effect?

7. As regards this issue both the courts below have concurrently held that the Will dated 16.7.1971 has been duly proved as Ex.PW2/1, and for which purpose, the courts below have held that though the two attesting witnesses had expired, PW-4 Sh. Surjeet Singh son of one attesting witness Sh. Sujan Singh had appeared and proved the execution and attestation of the Will. Let me at this stage refer to the discussion and conclusions of the first appellate court for holding that the Will is proved, and with which I agree, and such discussion is contained in paras 14 to 20 of the impugned judgment of the first appellate court and which read as under:-

14. Certified copy of the Will was proved as Ex.PW-2/1, through PW-2 a record keeper in the office of Sub-Registrar. Both the attesting witnesses of the Will had expired by the time evidence was recorded before the Ld. trial court. Though the plaintiff No.1 deposed that she also accompanied her Father-inLaw Sh. Makhan Singh to the office of Sub-Registrar and she was present at the time of attestation of the Will but not much importance can be attached to her testimony since admittedly she is not a witness to the Will, and qua absence of her signatures she gave a reason that since her daughter started weeping she went outside the office of Sub-Registrar. She admitted that she was not present when her father-in-law

signed the Will and that the two attesting witnesses also did not sign the Will in her presence.

15. PW-4 Surjeet Singh, is son of one of the attesting witness namely Surjan Singh. He had accompanied his father Surjan Singh along with testator Makhan Singh to the office of Sub-Registrar. This witness specifically deposed that Makhan Singh after understanding contents of the Will signed the same and the Will was executed and registered in his presence. He also deposed that his father Surjan Singh signed the Will in his presence and in presence of another attesting witness. He identified signatures of his father on the Will. Though the witness could not recollect the name of another attesting witness, in my considered view that does not impeach the testimony of this witness.

16. Sh. R.K. Bhatia from office of Land and Building Development office was examined by the plaintiffs as PW-5, who deposed that the property No.45 was mutated in the name of Gurcharan Singh on the basis of an affidavit, death certificate and the Will. He deposed that a no objection dated 25.02.1975 and an affidavit dated 14.03.1975, Ex.PW-5/1 and 5/2, executed by defendant No.1 Smt. Maan Kaur, were filed in the office. He also deposed that affidavit of Gurcharan Singh Ex.PW-5/3 was also filed along with a copy of the Will.

17. Perusal of Ex.PW-5/1 would reveal that defendant No.1 gave no objection qua transfer of property in the name of Gurcharan Singh and there is a mention of registered Will in this document. Similarly in her affidavit Ex.PW-5/2 it is mentioned that Makhan Singh left behind registered Will in favour of Gurcharan Singh. Gurcharan Singh also, in his affidavit Ex.PW-5/3, so stated.

18. This witness (PW-5) also deposed that the property No.51 was also transferred in the name of Gurcharan Singh on the basis of affidavit of Smt. Maan Kaur Ex.PW-5/6. In this affidavit also Smt. Maan Kaur mentioned about the Will.

19. Though the husband of Smt. Maan Kaur, namely Sh. Teja Singh, when appeared as witness D1-W1, claimed that signatures on these documents Ex.PW-5/1, 5/2 and 5/6 were forged and similarly signatures of Gurcharan Singh were forged on Ex.PW-5/3, but in his cross-examination he stated that he cannot say

whether Ex.PW-5/6 i.e. the affidavit, was signed by his wife or not. He also claimed ignorance as to whether Makhan Singh executed any Will or not.

20. Based on the above mentioned evidence the ld. Trial court came to a conclusion that the Will has been proved, which in my considered view also is rightly so held. The death of attesting witnesses to the Will was not disputed by the defendants during cross-examination of PW-1. There is no crossexamination of PW-4, son of Surjan Singh, on the point that Makhan Singh did not execute the Will or that he did not read or understand the contents of Will before signing the same. No suggestion was put to him that he was not present at the time of execution or attestation of Will or that his father did not sign it as an attesting witness. Under Section 69 of the Indian Evidence Act, it is provided that if no such attesting witness of the Will, as required under Section 68 of the Evidence Act can be found, it must be proved that the attestation of one attesting witness was at least in his handwriting and that the signatures of the person executing the document is in the handwriting of that person. This fact was so proved by PW-4 son of one of the attesting witness. Thus, the factum of execution of Will by Makhan Singh in favour of Gurcharan Singh was proved and ld. Trial Court rightly came to this conclusion. (underlining added)

8. Along with the aforesaid paras of the judgment of the first appellate court I have gone through the deposition of PW-4 Sh. Surjeet Singh. In his deposition Sh. Surjeet Singh confirmed that he went along with his father Sh. Sujan Singh to the Sub-Registrar for registering the Will. PW-4 has also deposed that the executant Sh. Makhan Singh signed the Will in his presence and the attesting witnesses of the Will including his father also signed the Will in his presence. In the cross-examination of this witness it is not put to PW-4 that he did not go to the office of the Sub-Registrar; that PW-4 has not seen the executant Sh. Makhan Singh executing the Will and that PW-4 has not seen the attesting witnesses put their signatures on the subject Will. There is no dispute that both the attesting witnesses have expired. As per Section 69 of the Indian Evidence Act, 1872, if a Will cannot be proved through any of the two attesting witnesses, the Will is proved by proving that signature of at least one attesting witness is of the attesting witness and that the Will was executed by the executant. Section 69 of the Indian

Evidence Act, 1872 reads as under:-

69. Proof where no attesting witness found. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

9. In view of the aforesaid aspects, in my opinion, both the courts below have rightly arrived at the conclusion that the Will dated 16.7.1971 of Sh. Makhan Singh has been duly proved to have been executed by Sh. Makhan Singh.

10. Learned counsel for the respondent nos. 1 to 7 has argued that the Will should not be held to be proved on account of the following arguments:-

(i) Original Will has not been filed on record and the Will which has been proved as Ex.PW2/1 is only a certified copy of the Will dated 16.7.1971 as existing in the records of the Sub-Registrar. To buttress this argument, attention is drawn to the admissions made by PW1/appellant no.1 in her crossexamination conducted on 11.8.1987 and 8.12.1994 whereby it was admitted that the original Will has been torn either by the husband of the appellant no.1 or the husband of the original defendant no.1 Smt. Maan Kaur.

(ii) The deposition of PW-4 cannot be said to have proved the due execution and attestation of the Will.

(iii) The deposition of PW-1/appellant no.1 shows that at the relevant/crucial point of time when the Will was executed and registered she was not present because she had to leave the office of the Sub-Registrar on account of her child weeping and hence there is no legal effect of the statement of PW-1/appellant no.1 for proving of the Will dated 16.7.1971.

(iv) The Will dated 16.7.1971 is not proved to be of Sh. Makhan Singh because Sh. Makhan Singh admittedly as per the case of the appellants was illiterate because he could not read and write and the Will contains the signatures of Sh. Makhan Singh in English, and thus, it should be held that the Will is not the Will of

Sh. Makhan Singh.

11. Let me at this stage reproduced the entire deposition and crossexamination of PW-4 and which is relied upon by both the courts below to hold that the Will dated 16.7.1971 is duly executed and attested by the executant Sh. Makhan Singh and attested by the attesting witnesses. The statement of PW-4 reads as under:-

PW4

S.Surjit Singh S/o Shri Sujan Singh 56 years business r/o 8256, Derawal Nagar, Delhi on SA.

My father died on 31.1.1986. S. Makhan Singh was the father of S. gurcharan Singh. S. Makhan Singh was the owner of property bearing no. A-58, Fateh Nagar, Delhi, 20/45 and 20/51 West Patel Nagar in Delhi S. Makhan Singh had given the property at Fateh Nagar by will to his daughter and the patel Nagar properties to his son again by a will (to be continued after lunch) RCand AC. ADJ. 2.6.1997

PW4

S. Surjit Singh S/o Shri Sujan Singh recalled for remaining examination-inchief on SA.

S. Makan Singh had given the property at Fateh Nagar to his daughter during his life time only and not by will. My father S.Sujan Singh had signed on the will Ex.PW2/1 at point A. I can identify his signature. This will was executed by S. Makhan Singh in the year 1971. This will was executed and registered at Kashmere Gate Sub Registrar s office. I had also gone there with my father. S. Makhan Singh has executed and registered the will in my presence. S. Makhan Singh After understanding the contents of the will signed the same My father also signed in my presence and the other witness also signed in my prsence. S. Gurcharan Singh could not sell the property for a period of ten years as per the will after the death of S. Makhan Singh S. Gurcharan Singh became the owner of the two properties ss mentioned in the will.

I knew S. Gurcharan Singh who was my maternal uncle as per relations. His condition was not alright since 1973- He became of unsound mind and he was given treatement by electric shots and he used to be taken to the A.I.M.S. Science. He did not become alright and he left the house and went away and his present where abouts are not known since then. I used to meet S. Gurcharan Singh during the life time of S. Makhan Singh also and after his death also.

xxxxxxxxxn by Shri V.K. Sharma ld. counsel for the deft.

I have taken death certifidate of my father which I can produce. I cannot tell definitely whether the property was given to the daughter through will or Gift but I say that the property has been given to his daughter. I am a matriculate. I am not an attesting witness of the will I had not signed as witness to the execution or to the registration of the will but I was present alongwith my father at the time of execution of the will. S. Makhan Singh was not aware of English. S. Makhan Singh neither signnor read English. I do not know the name of the other witness who had attested the will. I do not know if the said witness was related to S. Makhan Singh but he was known to S. Makhan Singh. This witness had accompanied S. Makhan Singh from his residence. I do not know how to read or write Urdu. The signature at point A are those of my father. I do not know the name of other witnessnor I can identify the signature of other witness. But according to me the signature of other witness do appear on the will in question.

It is wrong to suggest that there are no second signature of the second attesting witness on the will I came to know about the illness of S. Gurcharan Singh in 1973. I observed it myself and his ailment was being talked about in the relations. I saw the medical record in the hands of S. Gurcharan Singh. The medical record of Gurcharan Singh was in the custody with his father-in-law. The medical record was also with the plaintiff also. Gurcharan Singh left the house in the year 1976-77. I have not received any intimation about the death of my maternal uncle so far till today. S. Gurcharan Singh never recovered from his mental illness after any point of time after he got the same.

I cannot identify the signature of maternal uncle S. Gurcharan Singh. Gurcharan Singh and his sister had no transaction with regard to west Patel Nagar property

after demise of S. Makahan Singh between themselves. I do not know if the brother and sister had executed a relinquishment deed in respect of West Patal Nagar property between themselves after the demise of S. Makhan Singh. I do not know if Gurcharan Singh had entered into an agreement to sell with Kirti Lal Sachdeva. I do not know If S. Gurcharna Singh had some urgent work in Bombay in Jan. 1974 It is wrong to suggest that I am deposing falsely being relation of the plaintiff. RO and AC. ADJ. 3.6.1997 (underlining added)

12. The underlined portions of the aforesaid deposition, in my opinion leave no manner of doubt that this witness PW-4has duly proved the execution and attestation of the Will. There is no cross-examination of PW-4 on the relevant deposition proving the execution and attestation of the Will. Section 69 of the Indian Evidence Act specifically states that if both the attesting witnesses are dead then the Will can be proved by proving the signatures of one attesting witness and of the executant, and which has been done by PW-4 in his deposition. PW-4 was the son of one attesting witness Sh. Sujan Singh, and therefore, he was an eminently correct witness to prove the due execution and attestation of the Will more so because he had accompanied his father/attesting witness for the execution and registration of the Will. The mere fact that PW-4 did not remember the name of the second attesting witness cannot take away the fact that the Will has been proved to be duly executed and attested because PW- 4 has specifically deposed that the executant and both the attesting witnesses have signed the Will in his presence. The statement of PW-4 was recorded almost 26 years after the execution of the Will, and therefore, mere not remembering the name of the second attesting witness in my opinion will not be enough to discredit the entire testimony of PW-4.

13. So far as the argument of the respondent nos.1 to 7 for not relying on the testimony of PW-1/appellant no.1 is concerned, neither the courts below, and nor even this Court is relying upon previous deposition for proof of due execution and attestation of the Will dated 16.7.1971.

14. The argument of respondent nos.1 to 7 that Sh. Makhan Singh was illiterate and the Will is signed in English is rejected because factually this argument is

incorrect because the Will Ex.PW2/1 is not signed in English by Sh. Makhan Singh but is signed in Gurumukhi.

15. The next argument urged on behalf of the respondent nos. 1 to 7 was that in the absence of original Will it should be held that there existed no original Will duly executed by Sh. Makhan Singh and attested by witnesses as required by law. In this regard I must note that appellant no.1 as PW-1 in her deposition has stated that the Will was destroyed by her husband Sh. Gurcharan Singh, and at other place in her deposition it was stated that the Will was destroyed by the husband of defendant no.1. The issue is that whether such a statement will amount to the original Will not existing, and therefore, the Will dated 16.07.1971 cannot be said to have been proved.

16. In my opinion, merely because original Will has not been filed and proved as an original Will, and only the certified copy of the Will existing in the records of the Sub-Registrar has been proved cannot mean that there does not exist a valid Will dated 16.7.1971 of late Sh. Makhan Singh and which has otherwise been duly proved to have been executed and attested by PW-4 Sh. Surjeet Singh. To answer this issue I would like to draw the attention to the provisions of Sections 70 and 237 of the Indian Succession Act, 1925 and which provide that a Will is not revoked by the executant if it is found that the Will is torn or destroyed only by wrong or accident or there is such destruction of the Will, and the Will is revoked only by such an act by destruction of the Will by the testator or by a person at the instance of the testator so as to make the destruction of the Will as an act of revocation. Accordingly, merely because the original Will was torn by the husband of the appellant no.1 or the husband of defendant no.1 cannot mean that the Will dated 16.7.1971 cannot be held to be proved because non-existence of an original Will is relevant only if it is proved that the original Will does not exist because it was destroyed by a conscious act of the testator, for revoking the same. These Sections read as under:-

70. Revocation of unprivileged Will or codicil. No unprivileged Will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or another Will or codicil, or by some writing declaring an intention to revoke the same and executed

in the manner in which an unprivileged Will hereinbefore require to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

237. Probate of copy or draft of lost Will. When a Will has been lost or mislaid since the testator s death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the Will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is produced. (underlining added)

17. I therefore hold that merely because no original Will is filed on record would not mean that the original Will was not executed and attested inasmuch as, once a Will is proved to be executed and attested, the destroying of the same in any manner should be proved to be a deliberate act of the executant for revoking the Will, and which is not the case of the respondent nos. 1 to 7 in the present case neither in the form of any pleading nor in the form of any evidence that the Will was destroyed by Sh. Makhan Singh or on his directions by someone else in order to revoke the Will. It is accordingly held that the Will dated 16.7.1971 would stand proved as Ex.PW2/1 even in the absence of original of this Will.

18. Accordingly, I hold that the courts below have rightly arrived at a conclusion that the Will of Sh. Makhan Singh dated 16.7.1971 has been duly proved as Ex.PW2/1.

19. The next issue which has to be addressed by this Court is taking that Sh. Gurcharan Singh was of a sound mind when he executed the Relinquishment Deed dated 29.6.1973 in favour of his sister Smt. Maan Kaur, whether he had no right to execute this relinquishment deed in view of the restrictive condition in the Will that the suit property will not be alienated by Sh. Gurcharan Singh for 10 years after the death of Sh. Makhan Singh.

20. In the Will Ex.PW2/1, the last paragraph/the last clause, reads as under:

My son Shri Gurcharan Singh will have no power to sell this property for 10 years atleast after my death.

21(i) The issue is whether this clause is legal and valid or this clause is illegal and invalid. Counsel for the respondent nos. 1 to 7 relies upon the provision of Section 138 of the Indian Succession Act in support of the arguments that if by a Will dated 16.7.1971 a fund is bequeathed to a person with any direction contained in the Will that the fund will be applied or enjoyed in a particular manner then that would result in the fact that the Will has to be implemented as if it contained no such restricted direction for the application or enjoyment of the fund which is bequeathed. Reliance along with Section 138 of the Indian Succession Act is also placed upon two judgments in the cases of Gopala Menon Vs. Sivaraman Nair and Others (1981) 3 SCC 586 and Mehma Singh Vs. Dhan Kaur and others AIR 1986 Punjab and Haryana 355 (Single Bench).

(ii) To buttress the argument based on the provision of Section 138 of the Indian Succession Act, reliance is also placed on behalf of the respondent nos. 1 to 7 to the provision of Section 11 of the Transfer of Property Act, 1882 which provides that when there is a transfer of property absolutely in favour of a person then if the terms of transfer direct that interest shall be applied or enjoyed in a particular manner then a person to whom property is transferred is entitled to receive the property and dispose of the transferred interest as if there was no restrictive direction with respect to the application or enjoyment in a particular manner. Section 11 of the Transfer of Property Act, 1882 reads as under:

11. Restriction repugnant to interest created. Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Where any such direction has been made in respect of one piece of immoveable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have

in respect of a breach thereof.

22. In my opinion, I do not have to refer to Section 11 of the Transfer of Property Act for the reason that the provisions of the Transfer of Property Act apply when there is a transfer of property inter vivos i.e between two living persons. Provisions of Section 11 of the Transfer of Property Act will therefore not apply with respect to bequest under a Will and which is not between two living persons. However, nothing will turn on this aspect because the language of Section 138 of the Indian Succession Act is very similar to the provisions of Section 11 of the Transfer of Property Act and the issue is that whether Section 138 would apply in favour of respondent nos. 1 to 7 for holding that the direction contained in the Will that beneficiary Sh. Gurcharan Singh will not have the power to sell the property for 10 years after the death of Sh. Makhan Singh is not a valid clause.

23. In order that the argument based on the provision of Section 138 is put in a proper perspective and context, it is necessary to refer to the provisions of Sections 84, 85, 87, 88, 114 and 122 of the Indian Succession Act and these provisions read as under:

84. Which of two possible constructions preferred Where a clause is susceptible of two meanings according to one of which it has some effect, and according to the other of which it can have none, the former shall be preferred.

85. No part rejected, if it can be reasonably construed No part of a will shall be rejected as destitute of meaning if it is possible to put a reasonable construction upon it. xxxxx

87. Testator's intention to be effectuated as far as possible The intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

Illustration

The testator by a Will made on his death-bed bequeathed all his property to C. D. for life and after his decease to a certain hospital. The intention of the testator cannot take effect to its full extent because the gift to the hospital is void under

section 118, but it will take effect so far as regards the gift to C. D.

88. The last of two inconsistent clauses prevails Where two clauses of gifts in a Will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

Illustrations

(i) The testator by the first clause of his Will leaves his estate of Ramnagar to A , and by the last clause of his Will leaves it to B and not to A . B will have it.

(ii) If a man, at the commencement of his Will gives his house to A, and at the close of it directs that his house shall be sold and the proceeds invested for the benefit of B, the latter disposition will prevail.

xxxxx

xxxxx

114. Rule against perpetuity No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the life-time of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

xxxxx

xxxxx

122. Onerous bequests. Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully.

Illustration

A, having shares in (X), a prosperous joint stock company and also shares in (Y), a joint stock company in difficulties, in respect of which shares heavy calls are expected to be made, bequeaths to B all his shares in joint stock companies; B refuses to accept the shares in (Y). He forfeits the shares in (X).

24. Let us now analyse, compare and deal with the provisions of Sections 84, 85, 87, 88, 114 and 122 along with Section 138 of the Indian Succession Act by applying them to the restrictive condition contained in this Will for deciding as to whether the respondents are right in contending that the restrictive condition of not selling the suit property for 10 years after the death of Sh. Makhan Singh was not a valid restrictive condition.

25. I may note that whereas as per the last para of the Will dated 16.7.1971 there is a restrictive clause of not selling of the property, and there is no restraint against relinquishment; but in my opinion a larger expression will always include a smaller expression because if transfer of a property by sale was not permissible because of the restrictive covenant/para of the Will and which restrictive covenant is even though consideration would be received on account of the sale, then a fortiori when no consideration is received such as in a case of relinquishment, then such relinquishment therefore was intended to be covered by the executant within the meaning and purport of the restrictive covenant which prevented Sh. Gurcharan Singh not to sell the property for 10 years after the death of Sh. Makhan Singh.

26. Section 122 of the Indian Succession Act permits a bequest to be made with an obligation on the legatee, and the legatee either takes the Will as it stands with the obligation or he does not take the bequest under the Will. Putting it in other words, if there is an obligation under the Will, Section 122 of the Indian Succession Act requires that the obligation should be complied with. The question is that whether the restrictive covenant in the Will dated 16.7.1971 falls under Section 138 of the Indian Succession Act because it is a direction to apply or enjoy the property only in a particular manner or that the Will in question is a bequest with an obligation as envisaged in Section 122. Also, the provisions of Sections 84, 85 and 87 of the Indian Succession Act are relevant to be considered for they show that maximum effort should be made so that all parts of the Will and all the clauses of the Will should be given full effect to the extent possible and that the testator s intention should be effectuated as far as possible. These sections provide that no part of the Will is to be rejected if it can be reasonably construed and thus implemented. Section 88 of the Indian Succession Act only applies where there is absolute inconsistency between the earlier part and later part of the Will

and in which case the later part shall prevail.

27(i) I would like to observe and hold that the provision of Section 138 of the Indian Succession Act only applies when there is a direction for application or enjoyment of a particular bequeathed property, and that in my opinion Section 138 will not apply when there is nothing to do with application or enjoyment of a property but in the Will there is a restrictive covenant in the same for the property not to be alienated or sold further for a legally permissible period of time. In fact, such a restriction on alienation is permissible because of Section 114 of the Indian Succession Act which is a rule against perpetuity and as per which where a property is bequeathed, a beneficiary would become an owner by the property bequeathed/falling to him as an owner even if the bequest is postponed to a date beyond the lifetime of one or more persons living at the death of the testator plus a majority age of such person who is alive at the time of death of a person who is alive at the time of death of the deceased testator. Section 114 of the Indian Succession Act is similar to Section 14 of the Transfer of Property Act like Section 11 of the Transfer of Property Act is similar to Section 138 of the Indian Succession Act. Once therefore there can be a postponement in the date of vesting of ownership of the immovable property by a period being the lifetime of one or more persons who are alive at the date of the death of the testator, and plus beyond and up to the age of majority of another person, surely the clause in question directing that there will be no alienation or selling of the property for 10 years, will be clearly in the nature of an obligation falling within Section 122 and not a condition of application or enjoyment under Section 138 of the Indian Succession Act.

(ii) This conclusion is also reached on application of Sections 86 and 87 of the of the Indian Succession Act and which require that courts must make maximum endeavour to give effect to all parts and clauses of the Will and reconciliation of different parts of the Will even if in some manner they may be in conflict with each other. In my opinion, therefore, on reconciliation of all the different clauses of the Will, one part of which bequests by giving absolute ownership interest to Sh. Gurcharan Singh and the last part gives restricted covenant to not sell the property for 10 years thus postponing bequesting for becoming absolute owner to a future

date, it can be held that there is no inconsistency or repugnancy in both the parts of the Will because ownership of the suit property was given to Sh. Gurcharan Singh except that there was an obligation not to transfer the suit property for 10 years after the death of Sh. Makhan Singh, and which is a principle which has its basis in the doctrine of rule against perpetuity which has been found under Section 114 of the Indian Succession Act. I therefore hold that the clause in question restricting Sh. Gurcharan Singh from not selling of the property for 10 years after the death of Sh. Makhan Singh is not illegal and void but is valid and enforceable.

28. The issue can also be looked at from another angle by application of Section 88 of the Indian Succession Act which says that even if there are two inconsistent clauses, it will be the later clause which will prevail. Admittedly, the clause directing and disentitling Sh. Gurcharan Singh not selling the property for 10 years after the death of Sh. Makhan Singh is the very last clause/para of the Will. Therefore, if there is a conflict between the last para/clause and earlier para giving absolute bequest it will be the last para which will prevail and the effect of which would be that absolute bequest is given of the suit property to Sh. Gurcharan Singh not for 10 years after the death of Sh. Makhan Singh but after 10 years of death of Sh. Makhan Singh and which aspect once again has its basis and existence in the doctrine of rule of perpetuity contained in Section 114 of the Indian Succession Act which provides that there can be postponement of the ownership of the property bequeathed upto the lifetime of one or more persons living on the date of death of the testator or for a further period upto the majority of a minor person who is found to be living on the death of a person who is alive on the death of the testator.

29. I therefore hold that Sh. Makhan Singh by his Will dated 16.7.1971 Ex. PW2/1 had legally validly imposed the clause that the beneficiary Sh. Gurcharan Singh/his son would not be entitled to transfer the suit property for 10 years after the death of Sh. Makhan Singh. In my opinion though no clinching medical evidence is led on the mental state of Sh. Gurcharan Singh, possibly this mental state could be one of the reason for the father Sh. Makhan Singh not to allow Sh. Gurcharan Singh to transfer the suit property for 10 years after the death of Sh. Makhan Singh in order that the family of Sh. Gurcharan Singh, and who were his

widow and four minor daughters (being the appellants herein) would not loose roof over their heads (property no.20/51) and their source of livelihood from a shop/commercial property being the suit property no.20/45.

30(i) Reliance placed on behalf of the respondent nos.1 to 7 to the ratio of the judgment of the Supreme Court in the case Gopala Menon (supra) is misconceived for the reason that in the said judgment there was a bequest of an absolute ownership and therefore in the absence of any other clause it was held that such a clause giving absolute ownership by bequest cannot be construed in a restricted manner only to give life estate. This is so found to be held in paragraphs 4 to 6 of the judgment of the Supreme Court in the case of Gopala Menon (supra) and which paras read as under:

4. Paragraph 5 of Ravunni Nair's Will, Ex.B-8, contains a recital that the property described therein "shall vest in my wife, Sreedevi Amma, daughter of Moorkkath Madhavi Amma, with power of alienation". We are unable to appreciate how, in the face of this recital, it is possible to accept the appellant's contention that the testator intended to confer a limited estate only on his wife. The fact that the power of alienation was expressly given to her militates against the appellant's contention that the testator intended to confer upon her a limited interest in his property.

5. Learned counsel for the appellant relies upon Clauses 6 and 7 of the Will in support of his contention that though the power of alienation was given to the widow, the true intention of the testator was to give to the other heirs also a share in the property which was bequeathed to her. It is not possible to accept this contention because, Clauses 6 and 7 of the Will on which counsel relies deal with the income of the property and not with the corpus. The corpus has been dealt with in paragraph 5 of the Will under which, by words of unambiguous import, an unrestricted estate is bequeathed to Sreedevi Amma. The Will shows that she was of advanced years and therefore, the testator wanted to make some provision for the application of the recurring income of the property. Clauses 6 and 7 of the Will deal with that matter. The Will contains a provision for the maintenance and upkeep of a house which was used by the family as a place of worship. Clauses 6 and 7 provide, inter alia, that defendant 1, Shivaraman should invest the balance

of the income and that income should be shared in a certain manner by the heirs as specified in those clauses. The corpus itself was bequeathed absolutely to the wife. If there was any conflict between the different provisions of the Will, it may have becomes necessary to reconcile the conflicting clauses of the Will, as stated in the decision of this Court in Navneet Lal alias Rangi v. Gokul. But we see no inconsistency between the various provisions of the Will and are in agreement with the High Court that, upon a true construction of the Will, the intention which one can reasonably gather is that the testator wanted to confer an absolute estate upon his wife.

6. It is contended that even assuming that an absolute estate was conferred upon Sreedevi Amma, the testator did not give her the power to dispose of by Will the property which was bequeathed to her. This argument contains a contradiction. If Sreedevi Amma obtained an absolute estate in the property bequeathed to her by her husband, she would be entitled to dispose of that property in any manner she liked and no authorisation by her husband would be necessary, empowering her to dispose of the property by a Will. The absolute and unrestricted power to dispose of property is a necessary incident of an absolute estate. It is implicit, when an absolute estate is conferred, that the grantee is free to deal with and dispose of the property in any manner. Indeed, if an absolute grant is burdened with a restraint on alienation, the grant is good and the condition void.

(ii) In my opinion therefore the judgment of the Supreme Court in the case of Gopala Menon (supra) is not applicable because the facts of the present case are totally different where there is in fact found a specific restrictive separate and additional covenant in the Will and which covenant as already discussed above is valid, legal and operative.

31. For the same reason given for distinguishing the judgment in the case of Gopala Menon (supra), the judgment of a learned Single Judge of the Punjab and Haryana High Court in the case of Mehma Singh (supra) is also distinguishable because the facts of the said case showed that by the Will in the earlier part there was a specific bequest of ownership whereas in the later part of the Will it was held that though the beneficiary will be the owner but he will not be entitled to

alienate the property absolutely and because of the absolute bar and not a limited bar it was held in the case of Mehma Singh (supra) that the later portion of the Will which will have the effect of destroying the earlier part of the Will giving absolute ownership would be liable to be ignored.

32. The third aspect urged on behalf of the respondent nos. 1 to 7 was that the suit was bad for non-joinder of Sh. Gurcharan Singh who was alive on the date of the filing of the suit. This argument is a misconceived argument and liable to be rejected. Firstly, because it was not necessary for Sh. Gurcharan Singh to be a plaintiff in the suit because appellants/plaintiffs were claiming violation of their rights because the Relinquishment Deed dated 29.6.1973 executed by Sh. Gurcharan Singh in favour of the defendant no. 1/Smt. Maan Kaur affected their rights because appellants/plaintiffs were deprived of user and enjoyment and ownership of the suit property for 10 years after the death of Sh. Makhan Singh with the fact that once relinquishment deed is found to be illegal, the ownership of the suit property would revert back to Sh. Gurcharan Singh and thus, consequently the appellants who are the legal heirs of Sh. Gurcharan Singh would get benefit for their being the plaintiffs to be competent to file the suit. Secondly, this issue has now become academic only because during the pendency of the suit, the suit plaint was amended by adding para 13 stating that Sh. Gurcharan Singh is not heard of alive since now for 8 years before filing of the application for amendment and therefore he has to be presumed to be dead, and thereby plaintiffs who were the legal heirs of Sh. Gurcharan Singh would be entitled to continue with the suit. Once the suit is amended to bring on record the factum of deemed death of Sh. Gurcharan Singh, and hence the entitlement of the appellants/plaintiffs to file and continue with the suit, the suit as it stands today is without any infirmity as is pleaded to exist on behalf of the respondent nos.1 to 7/defendant nos.1 to 7. Therefore, even if the suit was not properly filed when it was originally filed, yet, this Court can take notice of subsequent events under Order VII Rule 7 CPC so that multiplicity of proceedings are avoided and appellants/plaintiffs are not harassed by filing of fresh suit only because of technical objections. This argument urged on behalf of the respondent nos. 1 to 7 is therefore rejected.

33. When the present second appeal was admitted on 2.12.2013, the following substantial question of law was framed: As to whether the judgment of the first appellate court dated 26.02.2013 suffers from any perversity? if so, to what effect?

34. In view of the above, the substantial question of law is answered in favour of the appellants/plaintiffs and against the respondent nos.1 to 7/defendant nos.1 to 7 and therefore the impugned Judgment of the First Appellate Court dated 26.2.2013 is set aside and the Judgment of the Trial Court dated 16.7.2003 is restored and upheld and thereby it is held that the Relinquishment Deed dated 29.6.1973 executed by Sh. Gurcharan Singh in favour of Smt. Maan Kaur is illegal and void and that the appellants/plaintiffs will be entitled to vacant and peaceful possession of the suit property being 20/45, Old Market, West Patel Nagar, New Delhi. Judgment and decree of the trial court as regards this property is restored. This second appeal is allowed and disposed of accordingly.

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