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Court : Punjab and Haryana

Decided On : Aug-29-2002

Reported in : (2003)133PLR79

Judge : S.S. Nijjar, J.

Acts : [Indian Succession Act, 1925](#) - Sections 109; [Hindu Succession Act, 1956](#) - Sections 8

Appeal No. : Regular Second Appeal No. 2175 of 1983

Appellant : Karail Singh and ors.

Respondent : Smt. Mohinder Kaur and ors.

Advocate for Def. : G.S. Punia, Adv.

Advocate for Pet/Ap. : M.L. Saggar, Adv.

Disposition : Appeal dismissed

Judgement :

S.S. Nijjar, J.

1. 'Does the legacy qua the deceased legatee lapse, if the legatee or one of the legatees, if there be more than one legatees dies is-sueless, during the life-time of the testator?' is the substantial question of law which has arisen in the present

Regular Second Appeal.

2. Gajjan Singh was the owner in possession of land measuring 85 Kanals 6 Marias situated in village Manakwal, Tehsil and District Ludhiana as detailed in the head note of the plaint. He executed the will on 4.10.1963 in favour of his three sons, namely, Kar-nail Singh, Malkeet Singh and Ajit Singh. Ajit Singh died on 17.1.1973. He left behind Mohinder Kaur his widow as the sole surviving legal heir. Gajjan Singh (hereinafter referred to as 'the testator') died on 26.10.1975. All the three sons were said to be joint legatees under the will. Karnail Singh and Malkeet Singh (hereinafter referred to as 'the plaintiffs') filed the present suit for permanent injunction restraining the defendants from alienating in any manner the suit land. The trial Court dismissed the suit. Aggrieved against the judgment of the trial court, the plaintiffs filed appeal in the Court of O.P. Dharwal, Addl. District Judge, Ludhiana, which was also dismissed. Thus, the plaintiffs have filed the present Regular Second Appeal challenging the judgments of both the courts below.

3. It was argued before both the courts below that the present case is covered either by Section 106 or by Section 107 of the [Indian Succession Act, 1925](#) (hereinafter referred to as 'the Act'). It was submitted that by virtue of Section 106 of the Act, the entire estate of the testator will devolve upon the plaintiffs because no specific share has been mentioned in the will. In the alternative, it was submitted that even under Section 107 of the Act only 1/3rd share of the estate shall fall into the residue of the estate of the testator. In that event, the plaintiffs as well as the defendants will be entitled to 3/8th share each of the estate of the testator. On the other hand, it was argued that under Section 109 of the Act, the legacy of the pre-deceased son would be inherited by the widow-defendant No. 1. Both the courts below have accepted the submissions made on behalf of the defendants.

4. The arguments raised before the lower courts have been reiterated by the counsel for the parties before this Court. Additionally, it has been argued by Mr. Saggarr that the widow defendant No.1 does not fall within the definition of 'Lineal Descendant'. Therefore, even if the legacy does not lapse by operation of Section 109 of the Act, the widow of the pre-deceased son cannot succeed to the legacy.

Therefore, the property would have to devolve either under Section 106 or under Section 107 of the Act. Mr. Punia, on the other hand submitted that the term 'lineal descendant' is synonymous to the term 'legal heir'. Since the widow survived the testator, the legacy would not lapse by operation of Section 109 of the Act. Learned counsel submitted that both the courts below have correctly interpreted and applied Section 109 of the Act and held in favour of the defendant-widow.

5. In support of his submissions Mr. Punia has relied on the judgments in the cases of Mohammed Yaqub Khan and another v. Mt. Aziz-un-niza and others, A.I.R. 1935 Oudh 437, Smt. Gita Devi v. Smt. Munder Devi, A.I.R. 1980 Allahabad 372, Smt. Shanti and others v. Smt. Bhagwani and others, A.I.R. 1984 Punjab and Haryana 313, and K.V. Krishna Veni and others v. K.K. Rajagopal and others, A.I.R. 1990 Kerala 337.

6. I have thoughtfully considered the submissions made by the learned counsel for the parties.

7. Sections 105, 106, 107, 108 and 109 of the Act have been the subject matter of the judicial interpretation by different High Court. The term 'lineal descendant' has also been interpreted by a Full Bench of the Rajasthan High Court in the case of Commissioner of Income-Tax, Delhi, Ajmer, Rajasthan and Madhya Bharat v. Dhannalal Devilal, Assessee, A.I.R. 1956 Rajasthan 30.

8. For a better appreciation of the submissions made by the learned counsel for the parties, it would be necessary to reproduce relevant provisions of the Act which are as under:-

'105. In what case legacy lapses:

(1) If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person.

(2) In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

106. Legacy does not lapse if one of two joint legatees dies before testator: If a legacy is given to two persons jointly, and one of them dies before the testator, the other legatee takes the whole.

107. Effect of words showing testator's intention to give distinct shares.

If a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then if any legatee dies before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.

108. When lapsed share goes as undisposed of:

Where a share which lapses is a part of the general residue bequeathed by the will, that share shall go as undisposed of. 109. When bequest to testator's child or lineal descendant does not lapse on his death in testator's life time: Where a bequest has been made to any child or other lineal descendant of the testator, and the legatee dies in the lifetime of the testator, but any lineal descendant of his survives the testator, the bequest shall not lapse, but shall take effect if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the will.'

9. The aforesaid sections have been interpreted by the Allahabad High Court in the case of Smt. Gita Devi v. Smt. Munder Devi, A.I.R. 1980 Allahabad 372. In this case it has been held that the Section 105 lays down that unless the legatee survives the testator, the legacy is extinguished. It has been further held that Section 106 is an exception to the Rule embodied in Section 105. If the legacy is given to two persons jointly, then it would not lapse on the death of the one of them. In the case of the death of one of the legatees, the other legatee takes the entire. The basis of this rule is the concept of joint tenancy between the legatees. Section 107 has been held to be another exception to Section 105. Under this section, it is provided that where the legacy is given to two legatees with distinct shares to each and one of the legatees dies before the testator, then the share which was intended to be given to the deceased legatee, will not go to the remaining legatee or legatees, but will lapse and go to the residue estate of the

testator. That share will then be treated as intestate and the heirs will succeed to it in accordance with law. The principle on which this Section is founded is the application of the rule of tenant-in-common. Thus the distinction between sections 106 and 107 is that Section 106 proceeds treating the legatee on the principle of joint tenancy and section 107 proceeds on the principle of tenancy in common. According to Section 108 where the share which lapses is a part of the residue bequeathed by the will that share shall go as undisposed of. That share will devolve on the heirs in accordance with law. Considering the further distinction between Sections 107 and Section 109, it has been held as follows-

'13. The position in the present second appeal is slightly different. The position is that the testator left behind two daughters and both were to take equally. One of them died in the life time of the testator leaving an issue. The question is whether that issue would succeed to the share of her deceased mother on the footing that the legacy was saved in view of the provisions of Section 109 of the Act. It has been seen above, that Section 107 indicates that where a legacy is given to legatees with distinct shares, and one of the legatees dies before the testator, then the share of that legatee would fall into the residue of the testator's property. Section 107 is general in its application and the use of the expression 'legatees' there applies by any two legatees or more. It will be seen that Section 107 makes no reference to the testator's child or children. This section also does not say anything where the legatee has left behind an issue. That question does not arise under Section 107. Therefore, it may be inferred that Section 107 speaks of a situation when the testator has bequeathed his property in favour of two or more legatees who may or may not be his or her children but indicating their distinct shares in the property. In such an event the legatee who dies his or her share goes back to the pool of the testator. Section 109 on the other hand, is a very specific provision. It takes care to save the property for the child of a deceased legatee who is a child of the testator. The primary consideration is that the legacy must not lapse, where the legatee who is the child of the testator dies in the life-time of the testator leaving behind an issue. The emphasis is that the legatee must be an offspring of the testator. In other words, the emphasis on Section 109 is that the legatee must be a child of the testator. This is that distinguishes this Section from Section 107. Once it is shown that the gift is in favour of a person or persons

who come within the meaning of the word 'child' of the testator and such a child dies in the lifetime of the testator leaving an issue the requirement of Section 109 is fulfilled. It was argued that Section 107 makes no such provision. This is correct for Section 107 is not confined to a gift in favour of the child of the testator. Section 107 envisages a gift in favour of any two or more persons, not necessarily the children of the testator. Consequently, the provisions which has been engrafted in Section 109 could not be provided in Section 107.

14. It is well settled that when there is a specific provision it excludes the general provision. Section 107 would be the general provision and Section 109 would be the special provision. Consequently, where the major element of Section 109 is present, the principles embodied in Section 107 cannot be made applicable.'

I am in respectful agreement with the interpretations placed on the various provisions of the Act by A. Banerji, J. of the Allahabad High Court.

10. As noticed above Section 109 of the Act deals with the special circumstances when bequest is made to the testator's child or lineal descendant. This section provides that bequest shall not lapse when it is made to any child or lineal descendant of the testator, even if the legatee dies in the life-time of the testator, provided any of his lineal descendant survives the testator. In other words, if the legatee dies leaving behind a son or daughter or any other lineal descendant who is alive at the time of the death of the testator, the bequest shall not lapse. But if the pre-deceased legatee dies issueless, would the bequest be covered under Section 109 of the Act?

11. The pre-deceased legatee, Ajit Singh having died issueless, the legacy would lapse. The widow, respondent No. 1 is not a lineal descendant of Ajit Singh. The terms 'Lineal Consanguinity' and 'Lineal Descent' have been defined in Wharton's Law Lexicon Fourteenth Edition Second Indian Reprint 1994 as under:-

'Lineal Consanguinity, that relationship which subsists between persons descended in a right line, as grandfather, father son, grandson.

Lineal Descent, the descent of an estate from ancestor to heir in a right line.'

Similarly, the terms 'Consanguinity, or Kindred' have been defined in the Wharton's Law Lexicon (supra) as follows:-

'Consanguinity, or Kindred, the connection or relation of persons descended from the same stock or common ancestor. It is either lineal or collateral. Lineal is that Which subsists between persons, of whom one is descended in a direct line from the other, as between son, father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between son, grandson, great-grandson, and so downwards in the direct descending line. Collateral agree with the lineal in this, that they descend from the same stock or ancestor, but differ in this, that they do not descend one from the other, See Marriage (Prohibited Degrees).'

The aforesaid definitions leave no manner of doubt that the widow would not fall within the definition of a lineal descendant.

12. The term 'lineal descendant; has also been considered by a Full Bench of the Rajasthan High Court in the case of Commissioner of Income-tax, Delhi Ajmer, Rajas-than and Madhya Bharat (supra). Although this judgment is given in the context of the Finance Act, (1951), the same would be relevant to decipher the meaning of the term 'lineal descendant' which occurs in Section 109 of the Act. In this case, it has been held that 'when the law speaks of 'lineal descendant', the intention is that a person must be descended in a right line, without any deviation, as from father to son, grand-son, great grand-son, and so on. Similarly, the 'descent' is lineal if it goes from mother to daughter, and grand-daughter, and great grand-daughter, because here also, it is in a right line without any deviation.

13. In view of the above, on a literal interpretation of Section 109 of the Act, the legacy in favour of the pre-deceased legatee, Ajit Singh having died issueless, would lapse. In my view, this would be contrary to the intention of the Legislature for enacting Section 109 of the Act. In the case of Smt. Gita Devi (supra), Allahabad High Court has held that section 109 is a very specific provision. The primary consideration is that the legacy must not lapse. In the case of Smt. Shanit (supra), this Court has expressed the opinion that Section 109 of the Act was enacted to protect the legacy for the benefit of the legal heirs of the pre-deceased child. In the case of K. V. Krishna Veni (supra), the Kerala High Court has also

taken the view that the word 'any' occurring in the expression 'bequest made to any child' in Section 109 cannot be interpreted to mean as 'only child', but is wide enough to take in its fold more than one child. In all the aforesaid cases, the courts have avoided the literal interpretation of the Section to give effect to the intention of the Legislature to save the bequest for the benefit of the legal heirs of a pre-deceased legatee of the testator. It is no doubt true that the golden rule of interpretation of statute is that the words of the Section should be read in their ordinary, natural and grammatical meaning. This rule is subject to the rider that if a literal construction would not promote the object of an Act, but would produce an absurd result, the Court would avoid such a result, if another construction of the relevant provision was possible. The Court would have to perform a balancing act. The provision should be construed in such a way that it promotes the intention of the legislature, without destroying the construction of the provisions. It is well settled that while construing a provision in the Act, the courts do not construct the provision. In this case, the intention of the Legislature by enacting Section 109 of the Act is to protect the legacy, of pre-deceased legatee for the benefit of his/her legal heirs. To construe the provision to mean that the legacy would not lapse only in cases where the pre-deceased son died leaving issue, would defeat the intention of the Parliament. Such an interpretation would mean that although the widow is the only surviving legal heir, the legacy would lapse. This would lead to absurd results. The court would avoid such an interpretation. Recently in the case of Rakesh Wadhawan and others v. Jagdamba Industrial corporation and others, (2002-2)131 P.L.R. 370 (S.C.), the Supreme Court while interpreting Section 13(2)(i) of the East Punjab Urban Rent Restriction Act, 1949 observed as follows:-

18. This is too simplistic an approach and defeats the purpose of enactment as would be seen shortly hereafter. In Behari Lal v. Ajudhia Dass, 1970 R.C.R. 76, the tenant tendered full amount claimed by the landlord to plead that what he was paying was more than the rent due and reserved his right to recover back the excess paid by him. The plea forcefully advanced by the landlord was that as the tenant had pleaded the amount tendered by him to be in excess, accompanied by a claim for refund, the same was not a valid tender, and therefore, the tenant was liable to be ejected. Such a tall plea of the landlord, of course, did not find favour with the High Court and rightly so. Yet the manner in which Section 13(2)(i) with

the proviso has been interpreted in some of the decisions by Punjab High Court, if allowed to prevail, the consequence would be that the tenants shall have to succumb to the pressure of the landlord by conceding and making the payment or tender as dictated by the landlord along with interest and costs; else he inescapably suffers the risk of eviction. If he raises a dispute in defence even if bona fide, and howsoever believed to be true, he must suffer eviction if on trial, for any reason including any fortuitous circumstances, he fails in substantiating his plea though he very much believed, and genuinely, that he would be able to do so. A tenant forcefully raising a plea in his defence stands to lose and suffer for his failure to substantiate his defence. On the contrary, if the landlord has made a false or exaggerated claim, submitted to by the tenant by making a deposit with interest and costs, and the landlord fails in substantiating his claim of the arrears, he does not stand to lose anything. Thus, there are no holds barred for the landlord while the tenant is subject to strict discipline. This could not have been the intendment of an enactment, which as its preamble speaks, is meant to restrict the eviction of tenants from urban premises.

19. There are two means of resolving the riddle: firstly, by placing such meaningful interpretation on the provision as would enable the legislative intention being effectuated; and secondly by devising such procedure without altering the structure as would enable the substantive law being meaningfully implemented....'

14. In the present case, the testator had made the will in favour of his three sons. Therefore, he had deliberately disinherited his three daughters who were impleaded' No.2, 3 and 4 in the trial court. Thus the intention of the testator was clear that he intended to bequeath the property on the three sons for the benefits of the sons and their legal heirs. The will was executed on 4.10.1963. His son Ajit Singh died on 17.1.1973. The testator knew fully well that Ajit Singh had died issueless and had left behind Mo-hinder Kaur, his widow as the sole surviving legal heir. The testator dies on 26.10.1975, i.e. 2 years and nine months after the death of his son Ajit Singh. If he had any intention of disinheriting the widow of Ajit Singh, he could easily have made another will. He could have executed a codicil to the existing will. Therefore, the intention of the testator was clear that the widow Mohinder Kaur would succeed to the legacy of Ajit Singh. To hold that the widow is

not entitled to the legacy of her deceased husband, Ajit Singh would be to negate the intention of the testator. This interpretation would also be against the spirit of the intendment of the Legislature in enacting Section 109 of the Act. This view of mine also finds support from the judgment of this Court in the case of Smt. Shanti (supra). It is to be noticed that under Section 8 of the [Hindu Succession Act, 1956](#) read with Schedule Clause 1, heirs include children of pre-deceased daughter, widow of a pre-deceased son and so on. Thus, if a son pre-deceases the father, under the natural succession, the share of the pre-deceased son would go to the widow, if he had died issueless. The purpose of Section 109 of the Act in my view, is to carry forward the same rule of succession. It is for this reason that the Legislature had provided an exception in Section 109 of the Act to the general provisions contained in Section 105 to Section 108 of the Act. In Smt, Shanti's case (supra), in similar circumstances, this court observed as follows:-

'10.....When the testator specifically excludes some of his children and wants his estate to go to the remaining children, then what he really means is that it should go to them and incase of any one of them predeceases him then it should go to the heirs of the predeceased child and precisely for that matter provision was made in Section 109 of the Act that such predeceased child by fiction of law shall be deemed to Have died immediately after the death of the testator so that the heirs of the pre-deceased child get the benefit of the testament and qua his share it should not lapse. The exclusion of some of the children from inheritance goes to show that the testator never intended that any part of his estate should go to them and if Section 109 of the Act is not applied then the legacy made to predeceased child will revert back to the testator and all his children will share the same. The result would be that the children whom he never wanted to succeed would succeed to some share. To avoid this result to flow Section 109 of the Act clearly provided that whenever testament is made in favour of any child or other lineal descendants, their heirs should succeed if they predecease the testator on the fiction that the death of child took place soon after the death of the testator.'

I would respectfully follow the aforesaid observations of G.C. Mittal, J. The intention of Section 109 of the Act is clearly to protect the legacy of any child or other lineal descendant of the testator for the benefit of the legal heirs of the pre-

deceased legatee.

In view of the above, this Regular Second Appeal is dismissed and the judgment and decree dated 31.8.1982 passed by the Sub Judge 1st Class, Ludhiana and the judgment and decree dated 8.8.1983 passed by the Additional District Judge, Ludhiana are hereby affirmed. No costs.

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