

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 28.10.2010
Judgment Pronounced on: 09.11.2010

+ **CS(OS) No. 1818/2001**

SURESH CHAND MATHUR

.....Plaintiff

- versus -

HARISH CHAND MATHUR

.....Defendant

Advocates who appeared in this case:

For the Plaintiff	: Mr Kirti Uppal with Ms Shipra Mathur, Advs.
For the Defendant	: Mr Abijat, Adv.

CORAM:-

HON'BLE MR JUSTICE V.K. JAIN

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

V.K. JAIN, J

1. This is a suit for declaration. The plaintiffs and defendants are brothers. Property No. B-4/196, Safdarjung

Enclave, New Delhi was owned by late Smt. Shakuntala Devi Mathur, mother of the parties. She expired on 05th November, 1998, leaving a Will dated 17th September, 1981, which was registered on the same date. The property was bequeathed by the Testator in the following terms:-

“(1) On the ground floor of the house situated at B-4/196, Safdarjung Enclave, New Delhi, I am in occupation of a drawing room measuring 13’-10½” into 11’-10” and one dining room measuring 13’-10½” into 10’-0”, one toilet measuring 8’-C” into 4’-8”, one kitchen measuring 8’-C” into 7’-0”. The same is bequeathed to my son Shri Harish Chand Mathur. In addition to the above one bedroom measuring 13’-10½” into 11’-10” with attached toilet measuring 6’-5” into 6’-4½” presently under the tenancy of one Shri Sohan Minz is also bequeathed to the said Shri Harish Chand Mathur. The entire open space including Canopy, verandah, etc. on the front side and half portion of the open space on the back side to the property is bequeathed to the said Shri Harish Chand Mathur. The entire portion thus bequeathed to said Shri Harish Chand Mathur has been marked as Red in the appended plain.

(3) The remaining portion of the ground floor, consisting of one bed, measuring 13’-10½” into 10’-0” and one kitchen (Box) measuring 8’-0” into 5’-0”, which is presently part of the tenanted portion with said Shri Sohan Minz including half portion of the open space on the back side of the property is

bequeathed to my son Shri Ishwar Chand Mathur.

(4) That under the municipal laws, the 1st and second Floor of the house can be further constructed, which I have not been able to carry out for want of funds. My sons Shri Suresh Chand Mathur, Shri Mahesh Chand Mathur and Shri Naresh Chand Mathur are settled in life and are in a position to construct the property for themselves, and with that view in mind, I further bequeath:

(a) The portion on the first floor above the dining and drawing room including toilets and kitchen, presently under my possession, to Shri Mahesh Chand Mathur for the purpose of constructing thereon suitable property according to the municipal law.

(b) Similarly, Shri Suresh Chand Mathur is bequeathed the portion on the first floor above the two bed rooms attached bath room and kitchen, presently under the tenancy of Shri Sohan Minz for the purpose of constructing property according to municipal laws.

(c) Similarly, Shri Naresh Chand Mathur is bequeathed space on the second floor for construction of house according to the municipal laws over all constructions on first floor. Provided that in the event the construction on the first floor is not carried out by the legatees over their respective portions within 10 years after my death, the portion thus bequeathed, shall revert to my son Shri Naresh Chand Mathur, who shall thereafter have a complete right over the

same as full owner. In that event rights of Naresh Chand regarding second floor will revert to Shri Harish Chand Mathur. Provided, further, that in case of Shri Naresh Chand Mathur who has been bequeathed the second floor does not carry out the constructions within ten years of constructions on first floor or within ten years of his entitlement to first floor as aforesaid, his entitlement will revert back to Shri Harish Chand. Shri Harish Chand Mathur shall have the right of extending the aforesaid period of ten years by consenting in writing to that effect. In case of pre-death of Shri Harish Chand, his heirs, will step in his place. It may be added here that Shri Mahesh Chand, Shri Suresh Chand Mathur and Shri Naresh Chand Mathur shall have complete right of construction over the space bequeathed to them. They shall, however, have no right to transfer the portion, thus bequeathed to them without first carrying out the constructions according to the municipal laws. They shall have free right of access and passage to the first or the second floor, as the case may be from the front side of the house, where the staircase is situated. They shall have no other right to the assets and property left by me after death.

2. It has been alleged in the plaint that late Smt. Shakuntala Devi Mathur changed her mind in November, 1997, by writing a letter, addressed to her children, on a non-judicial stamp paper, annexing therewith some pieces of paper written in her own handwriting and containing her

real intention in the matter. In one of the annexures to the aforesaid letter, she recorded that her house B-4/196 will go to her five sons and her daughter shall have no rights therein. This document, according to the plaintiffs, constituted a deemed codicil to the Will dated 17th September, 1981. The plaintiffs have sought a declaration that the restriction, contained in the Will dated 17th September, 1981 on transfer of the shares of the plaintiffs in the aforesaid property is void and invalid under Section 138 of Indian Succession Act and that the letter dated 06th November, 1996 reflects the real and last intention/desire of the Testatrix and amounts to a deemed codicil. They have also sought declaration that the defendants have no specific share in the property in terms of the Will, read with the deemed codicil.

3. The suit has been contested by defendant No.1, who has taken a preliminary objection that the suit for declaration simplicitor is not maintainable as the plaintiff has not claimed any consequential relief. He has taken another preliminary objection that the suit is not properly valued for the purpose of Court Fee and jurisdiction as the market value of the suit property is Rs 82,54,232/- and

3/5th share in this property should be valued at Rs 49,32,540/-, whereas the suit has been valued only at Rs 21 lacs. He has also taken another preliminary objection that since the alleged deemed codicil has not been attested by any witness, it does not comply with the mandatory requirement of law and, therefore, the plaint does not disclose any valid cause of action.

4. On merits, it has been alleged that the document dated 06th November, 1996 and its annexures are forged and fabricated documents. It has been claimed that the documents relied upon by the plaintiff are inconsistent with each other and the annexures of the document dated 06th November, 1996 do not bear any date. It has also been alleged that the deceased had bequeathed clearly demarcated and specified areas and rights to her sons.

5. The following issues are framed on the pleadings of the parties:-

- (i) Whether the suit is not maintainable? OPD
- (ii) Whether the suit has not been properly valued for purposes Court fee and pecuniary jurisdiction?
OPD

- (iii) Whether late Smt. Shakuntala Devi had executed documents marked annexures 3 to 9 to the plaint?
OPP
- (iv) In case Issue No.3 is proved in the affirmative, whether the said documents either collectively or independently constitute a deemed codicil, which supersedes or modifies the registered Will of the testatrix dated 17th September, 1981? OPP
- (v) Whether the restrictions contained in para 4 of the registered will dated 17th September, 1981 on transfer of the share in the suit property is void and invalid under Section 138 of the Indian Succession Act, 1925? If so, whether the plaintiffs have absolute right to sell their respective portions? OPP
- (vi) Relief.

6. **Issue No.1**

No submissions were made on this issue during the course of the arguments. The issue is decided against defendant No.1.

7. **Issue No.2**

No submissions were made on this issue during the course of the arguments. The issue is decided against defendant No.1.

8. **Issue No.3**

The plaintiffs have filed their own affidavit by way of evidence. In their affidavits, the plaintiffs have supported the case setup in the plaint. They have also produced their sister Smt. Shashi Mathur in the witness box as PW-4. Smt. Shashi Mathur has stated that on the 13th day after the death of her mother, the almirah was opened in the presence of all the brothers and sisters, the documents were taken out from it, and were handed over to her after supplying photocopies to all brothers and sisters. She has identified the handwriting of her mother Smt. Shakuntala Devi on the documents Ex.PW-4/1 to PW-4/7. During cross-examination, she stated that her mother had started writing regarding change of circumstances, but she did not change her Will which she had got registered in the office of Sub-Registrar in her presence.

7. Defendant No.1 has filed his own affidavit by way of evidence. No other witness has been produced by him in support of his case.

8. I see no reason to disbelieve the testimony of Smt. Shakuntala Devi as regards the handwriting on the documents Ex.PW-4/1 to PW-4/7. During cross-examination of the witness, no such suggestion was given to her that these documents are not in the handwriting of the deceased. When a witness deposes a particular fact and no suggestion to the contrary is given to him during cross-examination, the person against whom the deposition is made is deemed to have admitted that fact. Since defendant No.1 was disputing the claims of the plaintiff that Ex.PW-4/1 to PW-4/7 are in the handwriting of late Smt. Shakuntala Devi, it was incumbent upon him to dispute the deposition of PW-4 in this regard by suggesting to her that in fact these documents were not in the hand of late Smt. Shakuntala Devi. Even defendant No.1, in his affidavit by way of evidence, did not claim that the documents Ex.PW-4/1 to PW-4/7 were not in the hand of his mother. In his cross-examination, defendant No.1 admitted that besides the Will, 8 FDRs and documents Ex.PW-4/1 to PW-4/7 were recovered from the almirah of the deceased, after her death. In fact, in the later part of the cross-examination, he specifically admitted that documents Ex.PW-4/1 to PW-4/7

are in the handwriting of his mother. Thus, it is now an admitted fact that documents are in the handwriting of late Smt. Shakuntala Devi. The issue is decided in favour of the plaintiff and against the defendant.

9. **Issue No. 4 and 5**

These issues are interconnected and can be conveniently decided together.

EX.PW-4/2 is the main document relied upon by the plaintiffs, though certain portions of the property are also referred to in the stamped document Ex.PW-4/1 and the document Ex.PW-4/3. Vide document PW-4/2, the deceased wrote that her house B-4/196 belongs to all her 5 sons Suresh Chand, Naresh Chand, Mahesh Chand, Ishwar Chand and Harish Chand and that her daughters have no right in it. This document, however, does not bear any date and is not signed by any person as an attesting witness. In the absence of any date on this document, it cannot be ascertained whether it was written before or after execution of the Will dated 17th September, 1981. No evidence has been led by the plaintiffs to prove the date on which this document was written by late Smt. Shakuntala Devi. None of the plaintiffs claimed to be present at the

time when this document was written by her. PW-4 also did not tell the Court as to on which date, this document was written by her mother. It is true that the document Ex.PW-4/1 which is dated 06th November, 1996 and has been written on stamp paper purchased on the very same day refers to certain documents. But, since the Ex.PW-4/1 does not describe the documents referred in it, it cannot be ascertained whether Ex.PW-4/2 was one of those documents or not. This is more so when Ex.PW-4/2 does not bear any date. The same applies to the document Ex.PW-4/3, which contains a reference to some portion of the suit property. In fact, PW-2 expressly admitted in his cross-examination that he was not aware of the documents Ex.PW-4/1 to PW-4/7 during the lifetime of his mother.

10. What is more important is that none of the documents, out of Ex.PW-4/1 to Ex.PW-4/7, is witnessed by any person. Section 63 of Indian Succession Act, to the extent, it is relevant, reads as under:

Execution of unprivileged Wills- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged] or a mariner at sea, shall execute his will according to the following rules:--

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

Since Smt. Shankuntala Devi Mathur was not a soldier or an airman, employed in an expedition or engaged in actual warfare not was she a mariner at sea, any Will or Codicil by her was required to be executed in terms of Section 63(C) of the Act. As provided in Section 2(b) of the Act "codicil" means an instrument made in relation to a Will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the Will. The Codicil, therefore, is also required to be executed in the same manner in which a Will is to be executed.

11. In **Bhagat Ram And Another vs. Suresh and Ors.:** (2003) 12 SCC 35, Supreme Court observed that since by fiction of law, the codicil, though it may have been

executed separately and at a place or time different from the Will, forms part of the related Will, it would be anomalous to accept the contention that though a Will is required to be executed and proved as per the rules contained in the Succession Act and the Evidence Act, the document explaining, altering or adding to the Will and forming part of the Will is not required to be executed or proved in the same manner. In this regard, the Court made a reference to Section 70 of the Act which expressly provides that no unprivileged Will or codicil, nor any part thereof, shall be revoked otherwise than by marriage or by 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 is required to be executed. The Court expressly held that the same rule of execution, therefore, apply to a codicil, which apply to a Will to which the codicil relate and the evidence adduced in proof of execution of a codicil must satisfy the same requirements as apply to the proof of execution of a Will.

12. In **Lalitaben Jayantilal Popat Vs. Pragnaben Jamnadas Kataria**: AIR 2009 SC 1389, after referring to provisions of Section 63 of the Indian Succession Act,

Supreme Court held that one of the requirements of due execution of a Will is its attestation by two more witnesses which is mandatory. No judgment to the contrary has been brought to my notice by the learned counsel for the plaintiff. Since none of the documents out of Ex.PW-4/1 to PW-4/7 has been executed in the manner, prescribed in Section 63(C) of the Indian Succession Act, they cannot be considered as a valid Will or codicil to the Will dated 17th September, 1981. The issue is decided against the plaintiffs and in favour of defendant No.1.

13. **Issue No. 5**

Section 138 of Indian Succession Act reads as under:-

“Direction that fund be employed in particular manner following absolute bequest of same to or for benefit of any person.- Where a fund is bequeathed absolutely to or for the benefit of any person, but the Will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the Will had contained no such direction.”

14. A bare perusal of the above-referred Section would show that it applies to a case, where, on a reading of the Will, the intention of the Testator is found to be to give

whole of his estate absolutely to the legatee, but, he has imposed restrictions on the right of the legatee to use and enjoy that property as its absolute owner. In such a case, though the bequest will stand, the subsequent clause in the Will placing restriction on the right of the legatee would be treated as void. In other words, this Section applies to a case where the Testator has devised an absolute estate to the legatee, but, has specifically added a clause, which has the effect of reducing his power to deal with that property as an absolute estate. In such a case, the restriction placed on the right of the legatee needs to be rejected on account of its being repugnant to the absolute bequest of that property to the legatee. To take certain examples where a Will provides that on the death of the Testator, the legatee shall enjoy the property as its absolute owner, but he will not be entitled to alienate it or where he, while bequeathing the property to one of his family members, puts a rider that he will have no right to alienate it for a particular period or where he stipulates in his Will that the legatee will be able to sell the property bequeathed to him only to a particular person, thereby restricting the right of the legatee as absolute owner of the estate.

15. However, the Will, executed by late Smt. Shakuntala Devi on 17th September, 1981, does not come within the purview of Section 138 of Indian Succession Act, since this is not a case where any legatee has been given absolute right in any part of the property and then the right of that particular legatee with respect to use and enjoyment of that part of the property has been restricted or taken away. In this Will, there is no stipulation that any of the legatees will have no right or will have a limited right with respect to disposal of that property. A perusal of the Will would show that one part of the ground floor has been bequeathed to Shri Harish Chand Mathur, whereas the remaining part of the ground floor has been bequeathed to Ishwar Chand Mathur. The open space on the first floor, above the dining and drawing room, including toilets and kitchen was bequeathed to Shri Mahesh Chand Mathr, who could make construction thereon in accordance with municipal law. Another open space on the first floor, above the two bed rooms, attached bath room and kitchen which were under the tenancy of one Sohan, was bequeathed to Suresh Chand Mathur, for raising construction thereon in accordance with municipal laws. The construction on the

first floor by Shri Mahesh Chand Mathur and Shri Suresh Chand Mathur was to be raised within 10 years of the death of the Testator. In the event of Shri Mahesh Chand Mathur and/or Suresh Chand Mathur failing to raise construction on the first floor within the time stipulated in the Will, the portion of the person failing to raise construction on the first floor was to revert to Naresh Chand Mathur, who, then was to have complete right on the same as a full owner. In that event, the rights which Naresh Chand Mathur was given in the event of construction being raised on the first floor within the time stipulated in the Will, were to revert to Shri Harish Chand Mathur. In the event of Shri Naresh Chand Mathur also failing to raise construction on the first floor within 10 years of his becoming entitled to first floor, his entitlement is also to revert back to Shri Harish Chand Mathur. The stipulation for construction to be raised on the first floor, by Shri Mahesh Chand Mathur and Shri Suresh Chand Mathur, within 10 years of the death of the Testator, was not such a condition which could not have been fulfilled and, therefore, cannot be said to be an impossible condition. The conditional bequest of the estate is not unknown to law and is well-recognized by it.

16. A conditional bequest does not come within the purview of Section 138 of Indian Succession Act which applies to an altogether different situation where there is an absolute bequest of the legatee, but his right to deal with the property as its absolute owner is sought to be curtailed by the Testator. In fact, Section 131 of Indian Succession Act is the provision which applies to the bequest made by late Smt. Shakuntala Devi. This provision, to the extent it is relevant, reads as under:-

“Bequest over, conditional upon happening or not happening of specified uncertain event. (1) A bequest be made to any person with the condition superadded that, in case a specified uncertain event shall happen, the thing bequeathed shall go to another person, or that in case a specified uncertain event shall not happen, the thing bequeathed shall go over to another person.

Illustration

(ii) An estate is bequeathed to A with a proviso that if A shall dispute the competency of the testator to make a will, the estate shall go to B. A disputes the competency of the testator to make a will. The estate goes to B.”

This section deals with a defeasance clause, whereas Section 138 of the Act deals with a repugnant clause. The distinction behind a repugnant provision and a

defeasance provision is that where the intention of the Testator is to maintain an absolute estate conferred on the legatee, but he simply adds some restriction, in derogation of incidents of such absolute ownership, such restrictive clause would be repugnant to the absolute grant and, therefore void, but, where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over is taken to be valid and operative. Section 138 thus provides for divestment of the estate which has already vested, but is subject to divested by some act or event at an after period. Of course, the defeasance must be in favour of somebody in existence at the time the bequest is made.

17. In **Administrator-General vs. Hughes: 21 IC 183**, the Testator made a bequest in favour of a Baptist Church with a condition that (1) no ordained Minister or missionary be ever elected as a Deacon of the Church or be allowed to canvass for votes to secure his election. (2) that two cups, one of fermented and the other of unfermented wine should be provided at the communion service; (3) that the said

Deacons do not introduce any innovation into the practice of the said Church, but adhere to the old practices. In the event of the non-fulfillment of the conditions there was a gift over in favour of another Church. It was held that there was nothing illegal or impossible in the conditions and on non-fulfilment of those conditions, the gift over came into operation.

In **Shyama Charan vs. Sarup Chandra**: 14 IC 708, the Testator made an absolute estate to a legatee with condition superadded that the legatee shall personally live in the house and that if he does not live personally in the house, his interest shall and the estate will go over to someone else. Holding that there was nothing illegal in the condition, the bequest was upheld by the Court.

In **Enasu vs. Antony** AIR 1969 Ker 207, a clause in the Will provided that if any of the persons who had been enjoined to meet the expenses of the funeral ceremonies of the Testator and his wife and of certain specified charities commits default in meeting such expenses, then such person shall have no right to the property earmarked for such expenses. The condition was held to be a condition subsequent.

18. Since Shri Mahesh Chand Mathur and Shri Suresh Chand Mathur admittedly have failed to raise construction on the first floor within 10 years of the death of the deceased Testator, the portion bequeathed to them on the first floor stands bequeathed to Shri Naresh Chand Mathur, who will have to raise construction on it within 10 years from the date he became entitled to raise construction on the first floor. The rights in the second floor over the construction which Shri Naresh Chand Mathur is required to raise within the time stipulated in the Will will devolve on Harish Chand Mathur. If Shri Naresh Chand Mathur does not raise construction on the first floor within 10 years of becoming entitled to raise such a construction, his rights in respect of the first floor will revert back to Shri Harish Chand Mathur.

19. The learned counsel for the plaintiff has referred to the decision of this Court in **Smt. Rajrani Sehgal Vs. Dr. Parshottam Lal and others** AIR 1992, Delhi, 134. The will of the Testator in that case, to the extent it is relevant for our purpose, provided as under:-

"I wish that after my death my son Dr. Parshotam Lal will be entitled to the whole of my properties....

.....I also wish that my son Dr. Parshotam Lal shall not sell or mortgage or transfer or pawn the immoveable properties during his life time.

I also wish that my grandsons or my daughter in law shall not sell, transfer or mortgage the properties to anybody after the, death of Parshotam Lal.

I also further wish that the sons or daughters of my grandsons shall not sell, transfer or mortgage the properties to anybody.”

20. It was contended by the appellant before this Court that the Testator had created perpetuity in his family and has tended to limit the absolute enjoyment of the estate for an indefinite period which was prohibited by law since it offended the rule against perpetuity as contemplated by Section 114 of the Act and, therefore, the bequest in favour of the Testator was void and inoperative. On the other hand, it was contended on behalf of the son/respondent before this Court that once the Court was satisfied that the Testator wanted to give his all to the named legatee, then all subsequent restrictions would be void being repugnant to the predominant intention of passing the entire estate to the heir. This Court was of the view that the Testator had expressed an unequivocal desire that his son would be

entitled to all his immovable and movable properties and that the restrictions imposed against alienation were to be treated as repugnant to the dominant intention of the Testator and were liable to be ignored. This judgment has absolutely no applicability to the facts of this case before this Court, where there is no restriction on the right of any legatee to deal with the portion bequeathed to him, in any manner he desired.

21. The plaintiff has also referred to **Ramchandra vs. Anasuyabai:** AIR 1969 Mysore 69, **Pyare Lal vs. Rameshwar Das:** AIR 1963 SC 1706 (1706), **K. Babu Rao vs. Datta Rao:** AIR 1992 Kant 290, **Ajit Chandra vs. Akhil Chandra,** AIR 1960 Cal 551, **Surinder Kumar and Ors vs. Gyan Chand and Ors.:** AIR 1957 SC 875, 1958. I have gone through this judgment. None of them has any applicability to the matters in issue before this Court. The issue is, therefore, decided against the plaintiffs.

22. **Issue No.6**

In view of my findings on Issue Nos. 1 to 5, the plaintiffs are not entitled to any of the declaration sought by them in the suit.

ORDER

23. The suit is hereby dismissed without any order as to costs. Decree sheet be prepared accordingly.

(V.K. JAIN)
JUDGE

NOVEMBER 09, 2010
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