

REPORTED

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

DATE OF RESERVE: April 20, 2010
DATE OF DECISION: May 14, 2010

+ **RFA No. 67/2003**

RAJESH KHANNA & ANR. Appellants
Through: Mr. Rohit Gandhi, Advocate.

versus

ASHA MEHRA Respondent
Through: None

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL

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

: REVA KHETRAPAL, J.

1. The present appeal arises out of the judgment and decree dated 5th October, 2002 passed by the learned Additional District Judge, Delhi, in Suit No. 537/2001, whereby the suit filed by the plaintiff (the appellant herein) was dismissed.
2. The facts leading to the filing of the appeal are: -
 - a. That a suit for partition of the property bearing no.A-4/24, Krishna Nagar, Delhi-110 051, was filed consequent upon the death of its

owner, Smt. Maharani Devi, who died on 26th August, 1988 at 710, Katra Neel, Nai Basti, Delhi-110006.

- b. It is an admitted fact that late Smt. Maharani Devi was the second wife of Sh. Ram Kishan Dass Khanna, who was initially the owner of the suit property.
- c. Sh. Ram Kishan Dass Khanna had one daughter, namely, Smt. Bhagwanto Devi from his first wife and another daughter, namely, Smt. Asha Mehra, from his second wife. He had no son from any of his wives.
- d. Sh. Ram Kishan Dass Khanna and Smt. Maharani Devi adopted Sh. Ram Prasad Khanna, who was the son of his daughter Smt. Bhagwanto Devi, as their son on 15th January, 1949. Sh. Ram Kishan Dass Khanna died on 4th October, 1971.
- e. It is alleged that Smt. Maharani Devi executed her first Will on 12th May, 1967, which was registered on 24th May, 1967 by which she bequeathed the property to Smt. Asha Mehra, arrayed as defendant in the suit for partition filed by Sh. Rajesh Khanna and Ms. Priti Wahi, the son and daughter of Sh. Ram Prasad Khanna (the adopted son of Smt. Maharani Devi).
- f. Sh. Ram Prasad Khanna died on 4th November, 1987 and Smt. Maharani Devi died on 26th August, 1988.
- g. Smt. Maharani Devi had executed her second Will on 5th March, 1972, by which she revoked her earlier Will dated 12th May, 1967

and bequeathed her property in favour of Sh. Ram Prasad Khanna, who, as stated above, pre-deceased Smt. Maharani Devi.

3. The plaintiff's case as set out in the plaint is that according to the provisions of Section 113 of the Indian Succession Act, 1925, a Will in favour of a person who does not exist on the date of death of the Testator, is void. The legatee, Sh. Ram Prasad Khanna having pre-deceased Smt. Maharani Devi (the testatrix), in whose favour she had executed the subsequent Will dated 5th March, 1972, the said Will was rendered void to the extent she bequeathed her property in favour of Sh. Ram Prasad Khanna. It is further averred in the plaint that the said Will having been rendered void, all the legal heirs of Smt. Maharani Devi are entitled to inherit their legitimate shares in the property of Smt. Maharani Devi. Thus, Smt. Asha Mehra is entitled to half share in the property and Sh. Rajesh Khanna and Smt. Priti Wahi (the legal heirs of Sh. Ram Prasad Khanna), are entitled to 1/4th share each. Accordingly, the plaintiffs claimed to be entitled to a decree of partition in respect of the property bearing no. A-4/24, Krishna Nagar, Delhi-110 051 in their favour to the extent of 1/4th share each.

4. The defendant in the written statement filed by her contested the case by taking up a number of preliminary objections. On merits, however, it was not denied by the defendant that Smt. Maharani Devi, was the second wife of Sh. Ram Kishan Dass Khanna, and that the latter had one daughter, namely Smt. Bhagwanto Devi, from his first wife and

one daughter, namely Smt. Asha Mehra from this second wife. It was, however, denied by the defendant that Sh. Ram Prasad Khanna was the adopted son of Smt. Maharani Devi and it was submitted that as per the Hindu Law relating to adoption, the son of a daughter could not be adopted. It was not denied that Smt. Maharani Devi executed a Will on or about 12th May, 1967 in favour of the defendant, but it was denied that she had executed another Will on 5th March, 1972 in favour of Sh. Ram Prasad Khanna. It was submitted that on the death of Sh. Ram Prasad Khanna, the Will dated 5th March, 1972 would not take effect and in the absence of any other Will, the property would vest in the defendant upon the death of Smt. Maharani Devi.

5. The plaintiffs filed a replication to the written statement of the respondent reiterating and re-affirming the contents of the plaint and stating that the father of the plaintiffs was the lawfully adopted son of Sh. Ram Kishan Dass Khanna and that it has been so stated in the first Will of Sh. Ram Kishan Dass Khanna dated 15th July, 1972. It was also stated that the said fact of adoption was also mentioned in Suit No. 72 dated 22nd April, 1952, which was decreed as compromised before the learned Trial Court.

6. On the pleadings of the parties, the following issues were framed for consideration: -

1. Whether the suit is properly valued for the purposes of court fees and jurisdiction? OPP

2. Whether the plaintiff is entitled for a decree as prayed? OPP

3. Relief.”

7. **Issue No.1**

This issue was not pressed and accordingly was decided in favour of the plaintiffs.

8. **Issue No.2**

On this issue, the learned Trial Court, after adverting to the admitted facts returned the following findings: -

“In para No.3 of the plaint it is stated by the plaintiff that Maharani Devi executed her first will on 12/5/67 which was registered on 24/5/1967. The same is Ex.PW2/D1. It is also stated in the plaint that Late Maharani Devi executed another will dated 5/3/1972 in favour of her son Sh. Ramesh Prasad Khanna who admittedly died on 4/11/1987 i.e. prior to the death of Smt. Maharani Devi who died on 26/8/1988. It is also mentioned by the plaintiff that as per the provisions of Section 113 of the Indian Succession Act, the will in favour of a person who do not exist on the date of death of the testator is void so the subsequent will dated 5/3/1972 was rendered void to the extent she bequeathed her property in favour of her son Sh. Ramesh Prasad Khanna. The said will is Ex.PW1/12. So as per the plaintiffs themselves the will dated 24/5/1967 which is in favour of the defendant is admitted and the plaintiffs themselves have gone forward to say that the subsequent will dated 5/3/1972 executed by late Smt. Maharani Devi in favour of their deceased father is void as per the provisions of Section 113 of the Indian Succession Act. So in these circumstances, the will dated 12/5/1967 which is Ex.PW2/D 1 is the admitted document of both the plaintiffs and the defendant, which is a

registered will in favour of the defendant. So in my considered opinion, since a valid will Ex.PW2/D1 dated 12/5/1987 exists in favour of the defendant by virtue of which the Late Maharani Devi has bequeathed her property in favour of the defendant and the defendant being the owner of the suit property by virtue of the said will, the plaintiffs have no right in the suit property and cannot claim partition. The issue is accordingly decided in favour of the defendant and against the plaintiffs.”

9. Resultantly, the suit of the plaintiffs was dismissed by the learned trial court.

10. Aggrieved, the plaintiffs filed the present appeal. Although initially the appeal was being contested by the respondent, there was no appearance on behalf of the respondent when the appeal was argued and as a matter of fact when the respondent did not appear for three consecutive dates, this Court was left with no option but to hear the appellant. An opportunity was, however, afforded to the respondent to file written submissions within 10 days, which have not been received till date.

11. At the outset, Mr. Rohit Gandhi, the learned counsel appearing for the appellant, contended that since in the instant case, the legatee had died before the testatrix, the case is squarely covered by the provisions of Section 105 of the Indian Succession Act, 1925, which is applicable to the situation where the legatee dies before the testator/testatrix. He further contended that though in the suit for partition filed by the appellants, the appellants had relied upon the provisions of Section 113

of the Indian Succession Act, 1925, there can be no estoppel against the law, and on the assumption that there can be no estoppel against the law, where an erroneous finding of law is given by the Trial Court, relying upon the assumption of law drawn by the plaintiff, it is within the purview of the Appellate Court to correct the same.

12. Mr. Gandhi, the learned counsel for the appellant next contended that from a bare reading of Section 105 of the Indian Succession Act, 1925, it is manifest that in case the legatee dies before the testator, then the legacy forms 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. In the present case, there is nothing in the Will dated 5th March, 1972 to suggest that the testatrix intended that in the event of the death of the legatee, the property should go to some other person, and thus, it is clear that the suit property forms part of the residue of the property of the testatrix. In any case, the Will does not become void; it is only that the same cannot be given effect to.

13. A reference was also made by Mr. Gandhi, the learned counsel for the appellant, to the provisions of Section 109 of the Indian Succession Act, 1925. He urged that the provisions of the said Section were by way of an exception to the provisions of Section 105 of the Act and the appellants were entitled thereunder to the whole of the estate of Smt. Maharani Devi. He, however, very fairly conceded that the appellants were not seeking to place their case so high and would rest

content if a petition was effected of the estate of the deceased and they got their faire share. The provisions of Sections 105 and 109 read as follows: -

“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.

Illustrations

(i) The testator bequeaths to B “500 rupees which B owes me”. B dies before the testator, the legacy lapses.

(ii) A bequest is made to A and his children. A dies before the testator, or happens to be dead when the Will is made. The legacy to A and his children lapses.

(iii) A legacy is given to A, and, in case of his dying before the testator, to B. A dies before the testator. The legacy goes to B.

(iv) A sum of money is bequeathed to A for life, and after his death to B. A dies in the lifetime of the testator; B survives the testator. The bequest to B takes effect.

(v) A sum of money is bequeathed to A on his completing his eighteenth year, and in case he should die before he completes his eighteenth year, to B. A completes his eighteenth year, and dies in the lifetime of the testator. The legacy to A lapses, and the bequest to B does not take effect.

(vi) The testator and the legatee perished in the same ship-wreck. There is no evidence to show which died first. The legacy lapses.

109. When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime. – 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 as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the Will.

Illustration

A makes his Will, by which he bequeaths a sum of money to his son B, for his own absolute use and benefit. B dies before A, leaving a son, C, who survives A, and having made his Will whereby he bequeaths all his property to his widow, D. The money goes to D.”

14. In support of his contention that Section 105 enacts if the legatee does not survive the testator the legacy shall lapse and form part of the residue of the testator's property except where it appears by the Will that the testator intended that the legacy should go to some other person, reference was made by him to the judgment of the Supreme Court in the case of *S. Jhansi Lakshmi Bai and others vs. Pothana Appa Rao and others AIR 1969 SC 1355*, wherein it has been so held by the Supreme Court. Mr. Gandhi also relied upon the meaning of the word “lapse” as delineated in the judgment of Wickens, V.C., in *Browne v. Hope, (1872) 14 Eq 343* where the Vice Chancellor remarked:

“It is, I think, quite clear that a testator may prevent a legacy from lapsing, but the authorities show that in order to do that, he must do two things: he must in clear words exclude lapse; and

he must clearly indicate who is to take in case the legatee should die in his lifetime.”

15. Mr. Gandhi pointed out that the aforesaid dicta laid down in ***Browne v. Hope*** (supra) was referred to and relied upon by a Division Bench of the Punjab and Haryana High Court in the cases of ***Raghubir Singh (dead through LRs) and Ors. Vs. Jarnail Singh (dead through LRs) and Ors., RSA No. 1080 of 1991 and RSA No. 548 of 1991 decided on 21.03.2009.*** In the said cases, the Court discussed the judgment of the Lahore High Court in the case reported as ***Smt. Shiv Devi and ors. V. Nauhar Ram and Anr. AIR 1940 Lah 318***, wherein the testator had left his estate to his wife and three daughters, in equal shares, that is, each would possess a quarter of his estate on his death but had stated in the Will that during the lifetime of the wife, she would have the usufruct of the whole estate and it would be only after the wife's death that the three daughters would get the full benefit of the estate. The wife having died during the lifetime of the testator, it was held by the Lahore High Court that the legacy had lapsed, observing as under: -

“It is perfectly clear in the will which we have to construe that there is no clear exclusion. The testator obviously never contemplated the death of either his wife or any of his three daughters in his lifetime. He had contemplated his own death and that was all. Equally, there is no indication as to who was to take in case a legatee should die in his lifetime. It is clear, therefore that the bequest to the wife lapses. While it is perfectly clear that the testator did everything he could to exclude his son Mela Ram from his will he has, through events over which he had no control, not been able to exclude Mela Ram to the extent of one-fourth of

his estate. The decision of the lower Court in this connexion is, in our opinion, correct on the proper construction of the will, and this appeal is dismissed with costs.”

16. Following the judgment of the Lahore High Court in the case of *Smt. Shiv Devi and Ors* (supra), the Punjab and Haryana High Court in the cases of *Raghubir Singh and Tara Singh* (supra) held as follows: -

“48. The contention of the learned senior counsel appearing on behalf of the respondents, on the other hand, is that in view of the law laid down by Hon'ble High Court of Lahore in case of *Smt. Shiv Devi and Ors. v. Nauharria Ram and Anr.* (supra) no fault can be found with the judgment and decree passed by the learned lower appellate court as the reading of the Will would show that no provision was made stipulating therein as to what happen in case *Smt. Chinti Devi* died prior to the executant that is the situation in the present case. The contention of the learned senior counsel for the respondents, therefore, is that bequeath in favour of *Smt. Chinti Devi* lapsed and the property was to be treated to be intestate. On consideration of the matter, I find force in the contentions raised by the learned senior counsel for the respondents. Bequeath in favour of *Tara Singh* did not stipulate as to what would happen in case *Smt. Chinti Devi* predeceased the executant. Therefore, the learned lower appellate court has rightly applied the law laid down by Hon'ble Lahore High court that 79 kanals of land was to be inherited by all the legal heirs as per law of succession. The substantial question of law as framed is answered against the appellants and in favour of the respondents. Consequently, this appeal is also ordered to be dismissed but with no order as to costs.”

17. The learned counsel for the appellant also relied upon the judgment in the case of *Miss Virginia Lydia Maud Smith vs. Ivan*

Harold Donald Smith and Ors. AIR 1936 Sind 158, wherein the Court

held as under: -

“....But when all person who are to benefit under the will are mentioned by name, the bequest is not to them as a class but to each of them as an individual. [See Halsbury’s Laws of England, Vol. 28 para. 1205 and (1762) 2 Eden 123 (2) and (1914) 110 LT 623 (3)]. If the gift in favour of persons so named is made to them as tenants-in-common, and one of them dies before the testator, the share gifted to him lapses, and forms part of the residue of the testator’s property unless it appears from the will that the testator intended that it should go to some other person; see S.105, Succession Act.

As each of the four brothers and their sister in whose favour the gift was made in specific shares were named in the will, there is no scope for the argument that the bequest to them was a class bequest, or that it was not bequeathed to them as tenants-in-common. That being so, the bequest of 1/5th share in Rs.30,000/- made in favour of the brother who pre-deceased the testator has lapsed.”

18. Mr. Gandhi next submitted that it is well settled that any act done in misapprehension of the legal right or legal position does not create estoppel and that the Supreme Court in a plethora of judgments has held that there can be no estoppel against the law. An error of law can be corrected at any stage by any of the Appellate Courts. Reliance was placed by him, in this regard, on the decision rendered by the Hon’ble Supreme Court in the case of *M/s. Elson Machines Pvt. Ltd. vs. Collector, Central Excise* reported in *AIR 1989 SC 617* and the decision in *State of U.P. vs. U.P. Rajya Khanij Vikas Nigam Sangharsh Samiti*

(2008) 12 SCC 675. In the first case, the Supreme Court explicitly rejected the contention that the plea of estoppel could alter the legal provision as follows: -

“10. The next submission on behalf of the appellant is that the Classification Lists had been approved earlier and the Excise authority was estopped from taking a different view. Plainly there can be no estoppel against the law. The claim raised before us is a claim based on the legal effect of a provision of law and, therefore, this contention must be rejected.”

19. In the case of *State of U.P. vs. U.P. Rajya Khanij Vikas Nigam Sangharsh Samiti* (supra), the Hon’ble Supreme Court held that a statement, assurance or even an undertaking of any officer or a counsel cannot create estoppel against a statute. In paragraphs 42 to 44 of the said judgment, the Court observed as follows: -

“42. If there were statutory rules and such rules provide for absorption of employees on certain grounds and on fulfilment of some conditions laid down in those rules, it was the duty of the High Court to consider those rules and to decide whether under the statutory rules, such absorption could be ordered.

43. After all, the High Court was considering the prayer of the petitioners to grant a writ in the nature of mandamus. It was, therefore, expected of the High Court to keep in view the relevant provisions of law. The High Court mainly relied upon an assurance said to have been given by the Secretary on behalf of the Corporation that excess employees would be absorbed either in the government departments or in other public sector undertakings. From the record it appears that it was the case of the Secretary of the Corporation that no such assurance was given by him to the Court. But

even if he had given such assurance, it was of no consequence since in the teeth of statutory rules, such assurance had no legal efficacy.

44. It is settled law that there can be no estoppel against a statute. If the field was occupied by statutory rules, the employees could get right only under those rules. The High Court was equally bound to consider those rules and to come to the conclusion whether under the statutory rules, the retrenched employees were entitled to absorption either in government department or in any other public sector undertaking. Statement, assurance or even undertaking of any officer or a counsel of the respondent Corporation or of the Government Pleader of the State is irrelevant.....”

20. It was further contended that following the ratio of the decisions rendered by the Supreme Court, it has been time and again held that quoting or mentioning the wrong provision of law does not create a bar and/or stand in the way of evaluating the correct position of law. In *Roshan Lal Gupta vs. Shri Parasram holdings Pvt. Ltd. & Anr.* 157 (2009) DLT 712, it was held as under: -

“.....Of course, the preliminary objections repeatedly refer to Section 5 and not to Section 8 but mere failure to cite the correct provision of law and/or referring to the wrong provision, cannot defeat the rights of the parties. It is of significance that the written statement was filed soon after the coming into force of the 1996 Act and till when there was not much clarity about the statute and the recent past has shown as to how the Courts themselves have from time-to-time changed their interpretation of the various provisions of the statute. Thus, once the stock broker has, while submitting his first statement on the substance of the dispute, taken the plea of the jurisdiction of the civil Court being barred for the reason of the

existence of the arbitration agreement, it cannot be said that merely because reliance is made while taking the said plea to Section 5 instead to Section 8 would tantamount to the stock broker giving up the right to apply for arbitration.”

21. Having considered the matter from all angles and perused the precedents cited at bar, I am of the opinion that in the instant case the learned Trial Court erred in holding that the provisions of Section 113 of the Act were applicable, thereby rendering the bequest under the second Will, that is, the Will dated 5th March, 1972, void. Section 113 of the Act, as is clear from the bare reading of the said Section, deals with a bequest to a person not in existence at the time of the testator’s death and lays down that where the property is bequeathed to a person not in existence at the time of the testator’s death, subject to a prior bequest contained in the Will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed. For the sake of convenience, Section 113 is reproduced as under:-

“113.Bequest to person not in existence at testator’s death subject to prior bequest –
Where a bequest is made to a person not in existence at the time of the testator’s death, subject to a prior bequest contained in the Will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.”

22. The first illustration to the Section, which reads as follows also clearly shows that the provisions of Section are applicable only when the

Will is made in favour of a person who is not even in existence when the testator dies.

“ *Illustration*

(i) Property is bequeathed to A for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death, A has no son. Here the bequest to A's eldest son is a bequest to a person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to A's eldest son for his life is void.”

23. Thus, it is amply clear that the provisions of Section 113 of the Act are applicable in a situation where the person is unborn at the time of the death of the testator and not to a situation where the legatee dies before the death of the testator. It is, therefore, Section 105 of the Act which will be applicable in the instant case.

24. This Court having once arrived at the conclusion that it is Section 105 of the Act which came into operation upon the death of the testatrix, Smt. Maharani Devi, the inevitable conclusion which flows is that by operation of law, the property belonging to Smt. Maharani Devi devolved in the residue, as the legatee had died before Smt. Maharani Devi. The property having fallen in the residue of the property of the testatrix, and there being no provision in the Will dated 5th March, 1972 suggesting that the testatrix intended that in such an eventuality, the property should devolve on some other person, the law of intestate succession will prevail.

25. Thus clearly, the learned Trial Court failed to appreciate that once the legatee pre-deceased the testator, the legacy lapsed and formed part of the residue of the testator's property. The Will became inoperative, not void and, in any case, the revival of any earlier Will which was cancelled by the subsequent Will was not within the contemplation of the statute. This Court is fortified in coming to this conclusion by the provisions of Section 73 of the Act which deals with the Revival of Unprivileged Wills and lays down that:

“73. Revival of unprivileged Will - No unprivileged Will or codicil, nor any part thereof, which has been revoked in any manner, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same.”

26. Undoubtedly, in the instant case Smt. Maharani Devi, who was alive when the father of the appellants died, could in her wisdom, have re-executed her earlier Will dated 12th May, 1967 or in the alternative executed a fresh Will in favour of the respondent. Smt. Maharani Devi, having chosen not to do so before her own death, by virtue of the provisions of Section 105 of the Indian Succession Act, 1925, her property must now devolve in equal shares upon her surviving legal representatives.

27. In the view of the aforesaid discussion, the appeal succeeds. The judgment of the learned Additional District Judge dated 5th October, 2002 is set aside and the appellants are held entitled to seek partition of

the aforesaid suit property bearing no. A-4/24, Krishna Nagar, Delhi-110051. The records of the suit are returned to the Trial Court for the passing of a preliminary decree of partition and for the appointment of a Local Commissioner.

28. RFA No. 67/2003 stands disposed of in the above terms.

**REVA KHETRAPAL
(JUDGE)**

May 14, 2010
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