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

% *Judgment Reserved on: 19.8.2010*
Judgment Delivered on: 30.8.2010

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\+ **RSA No.130/2010 & CM No.11766/2010**

SH. RAM NIWAS SHARMA .....Appellant
Through: Mr.Sudhir Walia, Advocate

Versus

SHRI JAI LAL (Through LRs) & ORS. .....Respondents
Through: Mr.R.K. Bhardwaj and Mr. Dheeraj Bhardwaj, Advocates

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

For orders see RSA No.75/2008.

INDERMEET KAUR, J.

AUGUST 30, 2010
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Signature Not Verified
Digitally Signed
By:AMULYA

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

% *Judgment Reserved on: 19.8.2010*
Judgment Delivered on: 30.8.2010

\+ **RSA No.75/2008 & CM No.4555/2008**

SHRI NARINDER (Through LRs.) .....Appellant
Through: Mr.Som Dutt Sharma, Advocate

Versus

SHRI JAI LAL (Through LRs) & ORS. .....Respondents
Through: Mr.R.K. Bhardwaj and Mr. Dheeraj Bhardwaj, Advocates

AND

RSA No.84/2008 & CM No.5138/2008

SHRI KISHAN CHAND SHARMA .....Appellant
Through: Mr.Basant Kumar Gupta and Mr.Bijender Singh, Advocates

Versus

GIAN PRAKASH SHARMA & ORS
.....Respondents
Through: Mr.R.K. Bhardwaj and Mr. Dheeraj Bhardwaj, Advocates

AND

RSA No. 90/2008 & CM No.5454/2008

SHRI RAM NIWAS SHARMA .....Appellant
Through: Mr.Sudhir Walia, Advocate.

Versus

SHRI JAI LAL (Through LRs) & Ors. .....Respondents
Through: Mr.R.K. Bhardwaj and Mr. Dheeraj Bhardwaj, Advocates.

AND

RSA No.108/2008 & CM Nos.7125/2008 & 14541/2010

SHRI SUBHASH BHARDWAJ & ORS. .....Appellants
Through: Mr.Chander Shekhar, Advocate.

Versus

GIAN PRAKASH SHARMA & ORS. .....Respondents
Through: Mr.R.K. Bhardwaj and Mr. Dheeraj Bhardwaj, Advocates.

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Bhardwaj, Advocates.

AND

RSA No.130/2010 & CM No.11766/2010

SH. RAM NIWAS SHARMA .....Appellant
Through: Mr.Sudhir Walia, Advocate

Versus

SHRI JAI LAL (Through LRs) & ORS. .....Respondents
Through: Mr.R.K. Bhardwaj and Mr. Dheeraj Bhardwaj, Advocates

AND

RSA No. 131/2010 & CM No.11769/2010

SHRI KISHAN CHAND SHARMA .....Appellant
Through: Mr.Basant Kumar Gupta and Mr.Bijender Singh, Advocates.

Versus

SHRI GIAN PRAKASH SHARMA & ORS. .....Respondents
Through: Mr.R.K. Bhardwaj and Mr. Dheeraj Bhardwaj, Advocates

AND

RSA No.142/2010

SHRI NARINDER KUMAR (Through LRs) .....Appellants
Through: Mr.Som Dutt Sharma, Advocate.

Versus

SHRI JAI LAL (Through LRs) & ORS. .....Respondents
Through: Mr.R.K. Bhardwaj and Mr. Dheeraj Bhardwaj, Advocates.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

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

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INDERMEET KAUR, J.

C.M.Nos.7127/2008 (for exemption) & 14450/2010 (for exemption) in RSA No.108/2008

Allowed subject to just exceptions.

RSA No.75/2008 & CM No.4555/2008 (for stay)
RSA No.84/2008 & CM No.5138/2008(for stay)
RSA No. 90/2008 & CM No.5454/2008 (for stay)
RSA No.108/2008 & CM Nos.7125/2008 (for stay)
RSA No.130/2010 & CM No.11766/2010 (for stay)
RSA No. 131/2010 & CM No.11769/2010(for stay)
RSA No.142/2010

1. These are seven second appeals preferred by four appellants. They are (1) Ram Niwas, (2) Shri Kishan Chand Sharma, (3) Narender Kumar and (4) Subhash Bhardwaj. The dispute in all these cases relate to the right of inheritance of the four paisa share of Smt. Anar Devi in the deity, offerings/puja sewa made at the Kalkaji Temple; as also whether Smt.Anar Devi was competent to transfer this right when she herself being a lady could not have inherited the same.

2. Briefly stated the factual matrix of the case is as follows:

   i. Suit proceedings (wherefrom these appeals have arisen) had been initiated by Jai Lal S/o Ram Swaroop. He has filed a suit for declaration and injunction seeking a decree of declaration in his favour declaring him to be the sole legal heir of Smt.Anar Devi in terms of a will dated 19.2.1972 executed by her in his favour, bequeathing all her immovable and movable properties to him. This also included the puja sewa which Smt.Anar Devi had allegedly inherited from her deceased husband Chunni Lal. Subject matter of the suit is these prayer offerings, deity puja sewa rights of Anar Devi in the Kalkaji Temple.

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(ii) Plaintiff Jai Lal is the son of Ram Swaroop, Ram Swaroop is the brother of Chunni Lal, the deceased husband of Anar Devi. Chunni Lal had two brothers namely Ram Swaroop and Daulat Ram.

(iii) Ram Niwas subsequently impleaded in the suit proceedings was arrayed as defendant no.7. He claimed himself to be the grandson of the deceased Anar Devi. His version is that his mother Niyadri was the daughter of Anar Devi and Chunni Lal; Niyadri had pre-deceased her mother. Ram Niwas is claiming title of the suit property through his deceased mother.

(iv) Kishan Chand is the son of Nityanand. Nityanand is the son of Daulat Ram. Daulat Ram is the brother of Chunni Lal. Kishan Chand is thus grandson of Daulat Ram who is the brother of deceased husband of Anar Devi.

(v) Narender is the son of Tula Ram. Tula Ram is the son of Ram Swaroop who is the brother of deceased Chunni Lal and the husband of Anar Devi. Narender is thus the grandson of Ram Swaroop the brother of deceased Chunni Lal.

(vi) Subhash Bhardwaj is also the grandson of Daulat Ram. Daulat Ram as aforenoted is the brother of deceased Chunni Lal who was the husband of Anar Devi.

3. The present suit had been filed in the year 1974. The Trial Judge had disposed of the suit vide judgment and decree dated 16.8.1985. Five issues were framed initially, which read as follows:

1.Whether Anar Devi executed a will dated 18.2.72 in favour of the plaintiff, if so, was she competent to bequeath the property in suit?

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2.Whether defendant no.1,2,5 and 6 are the Lrs of Smt. Anar Devi?

3.Whether the suit is barred by the principle of resjudicata in view of Sh.S.N.Kpoor, Sub Judge, Ist Class, Delhi?

4.Whether the suit is not maintainable as alleged by defendants in para No.1 of the W.S.?

5.Relief.

4. On 2.5.1977, Ram Niwas was impleaded as a party on his application under Order 1 Rule 10 CPC (hereinafter referred to as 'the Code'). He was arrayed as defendant no.7.

5. On 19.9.1977 two additional issues were framed. They inter alia reads as follows:

i.Whether Ram Niwas Sharma is the grand son (Dhowta) of Anar Devi? If so to what effect?

ii.Whether the defendant No.2 is entitled to inherit the property in suit?

6. On 16.10.1985 the suit was decreed. While disposing of issue no.1 the Trial Court had relied upon the testimony of PW-1 Yogender Pal, the person who was present at the time of execution of the will, PW-2 Mool Shanker, attesting witness to the will. The will was proved as Ex.PW-1/A. Deed writer PW-4 Deen Dayal has also been examined. The will had been challenged by the defendants on the ground that it was executed in suspicious circumstances. Trial Judge disbelieved this version. Statement of PW-3 Jai Lal, the plaintiff was also examined in this context. Trial Judge noted that no suggestion had been given to PW-1 or to PW-2 that the will had been executed by Anar Devi either under coercion or duress. Provisions of Section 63 of the Indian Succession Act were held to be duly complied with. Contention of the defendant that the will was a typed document showing that it was prepared prior in point of time and Anar Devi had not understood its contents was considered and discarded. The opinion of the

handwriting expert who had come into the witness box as a defence witness DW-7 was gone into in detail; he had filed his report in Suit No.61/69; in view of the categorical ocular evidence i.e. testimony of the eye witnesses who had seen the executant execute the will was given weightage over and above the report of DW-7. In this context the testimony of the witnesses of the plaintiff in whose presence the will had been executed by Anar Devi had been upheld; the will was held to be duly executed. While disposing of this issue, the Court had also relied upon provisions of Section 14 and 30 of the Hindu Succession Act, 1956 to draw a conclusion that the property held by a female after the commencement of the Act would be held by her as a full owner and not as a limited owner. After the death of Chunni Lal on 4.12.1971 Anar Devi had become the absolute owner of all the properties both movable and immovable inherited by her from her husband. The Court had further held that the offerings in the temple were her absolute property which she had validly and legally bequeathed in favour of the plaintiff.

7. While deciding additional issues no.1 and 2, it was held that defendant no.7 is not the son of Niyadri i.e. he is not grandson of Anar Devi; he has no right or title in the suit property.

8. This judgment dated 16.8.1985 was assailed in first appeal. On 9.4.1994 the first Appellate Court decided the three appeals filed by Ram Niwas, Nihal Chand, Krishan Chand. Vide this judgment, appeals were allowed; matter was remanded back to the Trial Court with a direction that the evidence sought to be led by Ram Niwas i.e. the statement of Ram Niwas as also the statement of Kamla Sharma be recorded. To that extent the judgment and

decree dated 16.8.1985 was modified. Fresh findings on issue no.1 and 2 were ordered to be recorded. The findings on the remaining issues, however, remained undisturbed.

9. On 31.5.2000, the Court of the Civil Judge decided these additional issues. Suit of the plaintiff Jail Lal was decreed. Plaintiff was held to be the sole legal heir of Anar Devi and entitled to succeed to the properties both immovable and movable including the share of Anar Devi in the income of temple Kalkaji and also to perform puja sewa. Ram Niwas not being the grandson of Anar Devi was not entitled to any relief.

10. This judgment and decree dated 31.5.2000 was the subject matter of a fresh round of litigation. On 1.12.2007 the Additional District Judge dismissed the appeals filed by Ram Niwas, Narender, Subhash Bhardwaj and Kishan Chand Sharma, they had impugned the judgment dated 31.5.2000.

11. Against this judgment and decree dated 01.12.2007: Four second appeals i.e.

(a) RSA No.75/2008 was preferred by appellant Narender.

(b)RSA No.85/2008 was preferred by appellant Kishan Chand Sharma

(c) RSA No.90/2008 was preferred by appellant Ram Niwas

(d) RSA No.108/2008 was preferred by appellant Subhash Bhardwaj

12. In the course of the hearing of these appeals on 13.8.2009 with the consent of the parties, the case was remanded back to the Additional District Judge to hear the appeals afresh on the grounds raised by them on all other issues except the grounds relating to issues no.1 and 2.

13. On 19.2.2010 the Court of the Additional District Judge decided these appeals in terms of the direction of this Court dated

13.8.2009. All the issues i.e. issue no.1 to 5 were decided in favour of the plaintiff and against the defendant. Appeals were dismissed.

14. Assailing the order dated 19.2.2010:

(a) RSA No.130/2010 had been preferred by appellant Ram Niwas

(b) RSA No.131/2010 had been preferred by appellant Kishan Chand Sharma

(c) RSA No.142/2010 had been preferred by appellant Narender.

(d) Objections had been filed by appellant Subhash Bhardwaj on 25.5.2010 against his judgment and decree dated 19.2.2000. These objections were contained in CM No.14541/2010.

15. Before this Court arguments have been urged by each of the appellants. Arguments by and large are common and overlap one another; they have all assailed the will dated 19.2.1972 executed by Anar Devi. It is contended that Anar Devi being a female could not have inherited the puja sewa rights from her deceased husband Chunni Lal. She herself having no title to this puja sewa she could not have bequeathed any such right in favour of Jai Lal. Attention has been drawn to the replication filed by Jai Lal in the proceedings before the Trial Court which was the replication to the written statement of Subhash Bhardwaj wherein the plaintiff had stated that there is a custom prevailing that women can also perform puja/sewa. It is submitted that no such evidence has been led by the plaintiff before the Trial Court to substantiate his version that as on date there was a prevailing custom which enabled women also to participate in puja/sewa. Attention has been drawn to para 4 of the plaint wherein there is a reference to the will purported to have been executed by Anar Devi in favour of Jai Lal but a perusal of this document show that there is no mention of the puja sewa/offerings having been bequeathed to Jai Lal; the will is absolutely silent on this aspect. It is contended that

this document has not been correctly interpreted by both the Courts below. These are substantial questions of law.

16. On behalf of Kishan Chand Sharma in addition, it is submitted that Jai Lal (through his legal representatives) had filed a suit i.e. Suit No.146/2005. Attention has been drawn to the plaint filed therein; reference has been made to paras no.9 and 13. It is stated that in the plaint LRs of Jai Lal had made an admission that after the judgment of Sh.S.N.Kapoor passed on 01.2.1974 in Civil Suit No.61/69 wherein it had been held that no will could be executed of the offerings of the Kalkaji Temple; this judgment dated 1.2.1974 has become final. It is submitted that this averment was made by the plaintiff (Jai Lal though his LRs) himself in the aforenoted pleadings on which he cannot retreat. It is further submitted that Jai Lal had filed proceedings seeking a succession certificate in the year 1973 which were contested proceedings; Jai Lal had not raised any plea that he is entitled to the puja offerings of the Kalkaji Temple; this was a regular civil suit under Section 295 of the Indian Succession Act and the said proceedings are binding.

17. Arguments have been countered by learned counsel for the respondents. It is pointed out that this Court is sitting in second appeal and can only examine substantial questions of law if they have arisen. The memos of appeal filed by the appellants in each of the RSAs before this Court have not raised any substantial question of law. It is submitted that the question of authenticity of the will has already been gone into by the Trial Court; this is a fact finding enquiry. Attention has been drawn to the written statement filed by Narender in the Trial Court where in para no.3,

it has been admitted that Anar Devi had executed a will in favour of Jail Lal and he would entitled to inherit her estate. It is submitted that Narender has made a clear and categorical admission before the Trial Court about the authenticity of the will; he cannot now challenge it. Even otherwise the question as to whether the puja offerings are the subject matter of a bequeath or not has also been gone into in detail by both the fact finding Courts. The document i.e. the will Ex.PW-1/A dated 19.2.1972 has been scrutinized in detail. None of these issues can now be re-agitated in a second appeal. The appeals are liable to be dismissed in limine.

18. Additional arguments propounded by the learned counsels for the appellants in rebuttal have been dealt with in the subsequent paragraphs. Arguments have been heard in depth and in detail. The memos of appeal containing the questions of law as enumerated by each of the appellants have also been perused.

19. (i) Appeals filed by Narender are RSA No.75/2008 and RSA No.142/2010. Substantial question of law raised in the first appeal relate to the findings of the first Appellate Court dated 9.4.1994. These findings of the first Appellate Court dated 9.4.1994 had been modified by an order of this Court dated 13.8.2009 whereby the Additional District Judge had been directed to rehear the appeals on all issues except additional issues no.1 and 2 on which a finding had already been returned on 31.5.2000 and reaffirmed on 1.12.2007. The first five issues framed in the suit were decided vide the judgment dated 19.2.2010. The substantial questions of law raised in RSA No.142/2010 have also been perused. They lay a challenge to the authenticity of the will dated 19.2.1972. As pointed out by the learned counsel for the

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respondent, in the written statement appellant Narender has in fact admitted the execution of the will by Anar Devi in favour of Jai Lal with the further submission that Jai Lal is entitled to succeed to the estate of Anar Devi including the puja sewa of the Kalkaji temple. It does not now lie in the mouth of the present appellant to assail the authenticity of the will. He has however challenged the interpretation of the document; his submission being that the entire document i.e. the will is silent on the bequeath of the puja sewa/offerings; there is no whisper of the same.

(ii) The memo of appeal and the substantial questions of law raised by Kishan Chand Sharma are contained in RSA No.82/2008 and RSA No.131/2010; they relate to the applicability of the provisions of Order II Rule 2 of the Code. In this second appeal, it has been contended that the right of worship and to receive offerings of the deity is not transferable. Further the provisions of XII Rule 6 of the Code had not been adhered to and the Courts below had disregarded the order dated 1.7.2005 which was an order passed by Additional District Judge on this application.

(iii) The third set of appeals has been filed by Ram Niwas which are RSA No.90/2008 and RSA No.130/2010. The substantial questions of law enumerated in the body of the first appeal relate to the authenticity of the will; whether a mere registration of the will satisfies the test of Section 68 of the Indian Evidence Act and would be a sufficient proof for its due execution. It is submitted that where the defence raised is that the will has been executed under suspicious circumstances, it is for the propounder of the will to discharge this burden. The same substantial questions of law have been raised in the second appeal.

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(iv) The last set of appeals have been preferred by Subhash Bhardwaj i.e. RSA No.108/2008. It is contended that the will has purported to bequeath a property which is unbequeathable (a woman is not entitled to inherit puja/sewa rights); Anar Devi thereby could not have acquired any such right by way of inheritance from Chunni Lal; she herself not having any title to the subject matter of the suit, could not have passed any better title to Jai Lal. Provisions of Order II Rule 2 CPC had also not been considered by the two fact findings Courts below; a suit for declaration without any consequential relief was also not maintainable. In this appeal on 25.5.2010, objections have been filed which are contained in CM No.14541/2010. Learned counsel for the appellant Subhash Bhardwaj has placed reliance upon a judgment reported in [1975] 1 SCR 728 *K.K.Ganguly Vs. P.Banerjee* to substantiate his submission that under Hindu Law although shebaiti rights are inheritable like any other property, yet it lacks the other incident of proprietary rights i.e. the capacity of being freely transferred by the person in whom it is vested. It is stated that there are three exceptions to this rule; the third of which speaks of a custom which is the contention of the plaintiff in his replication yet he has chosen not to lead any evidence on this score to establish that custom had permitted Anar Devi to inherit the puja sewa rights. Puja sewa offering rights could not have been transferred to a woman; yet the finding of the Court that the Will had bequeathed these rights in favour of Jail Lal is an illegality. Reliance has been placed upon another judgment reported in [1985] 3 SCR *Shambhu Charan Shukla Vs. Thakur Ladli Radha Chandra Madan Gopalji Maharaj & Anr.* to support this

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submission.

20. This Court is sitting in second appeal. Section 100 of the Code was amended in 1976 to curtail second appeals with the laudable object of not increasing arrears in High Courts. As recently as in 2009 RLR 27(NSC) *Koppi Setty V.Ratnam Vs. Pamarti Venka* Supreme Court has held that the High Court in their anxiety to do justice is unnecessarily interfering with concurrent findings of fact and are ignoring the mandate of the amendment that second appeals should be only be on a question of law which again must be a substantial question of law. The object of this amendment as per the report of the Law Commission was that any rational system of law should have only hearings on questions of facts; one by the Trial Court and other by the first Appellate Court as a search for the absolute truth. Thereafter there must be reasonable restraint to reconcile which is based on the doctrine of finality. Finality is absolutely necessary to give certainty to law. At some stage the questions of fact must be allowed to rest without re-agitating them again. This legislative intent was clear at the time when Section 100 was amended; the second Appellate Court cannot be a third trial of facts.

21. It is in this background and backdrop that the arguments addressed before this Court have to be appreciated. The impugned judgment has drawn out the chequered history between the parties. It has been a long drawn litigation between the parties spanning over several generations; it had started in 1974 and even after more than three and a half decades the parties are still litigating.

22. The dispute between the parties relate to the devolution of

the rights of late Anar Devi to perform puja/sewa and the income of the Kalkaji Temple. Anar Devi was the wife of Chunni Lal. Chunni Lal as a pujari was having a share in the puja/sewa which was the income of the Kalkaji Temple to the extent of four pies in a rupee. Chunni Lal and Anar Devi had a daughter namely Niyadri. Niyadri was married to Sohan Lal. Niyadri had pre-deceased her mother. As per the plaintiff, she had died issueless. As per the defendants she had died leaving behind her son Ram Niwas who had subsequently been impleaded in the present suit as defendant no.7. Chunni Lal died on 04.12.1971. Anar Devi died on 20.8.1973. After his death Anar Devi succeeded to his estate. In suit No.61/1969 which was a suit under Order I Rule 8 of the Code relating to the puja/sewa rights of the Kalkaji Temple; Anar Devi was one amongst other widows; being the widow of Chunni Lal she had also got share of the puja/sewa amounting to Rs.20,833/-. DW-1 Kishan Chand has admitted all these facts in his cross-examination. There is no dispute to this fact.

23. Anar Devi had purportedly left a will dated 19.2.1972 (registered on 9.3.1972) in favour of Jai Lal who was her nephew being the son of her brother-in-law i.e. the son of Ram Swaroop. Present suit was filed by Jai Lal seeking a declaration that he was the sole legal heir of Anar Devi in terms of the will dated 19.2.1972 and was entitled to succeed to her estate both immovable and moveable which included the share of Anar Devi in the puja/sewa of the Kalkaji Temple. There were six defendants originally of whom Kishan Chand, Narender, Subhash Bhardwaj were all arrayed as defendants. Kishan Chand was defendant no.1; Narender was defendant no.6; Subhash Bhardwaj is claiming

through Nihal Chand defendant no.3; Ram Niwas claiming to the grandson of Anar Devi had moved an application under Order 1 Rule 10 of the Code pursuant thereto he had been impleaded as defendant no.7.

24. The suit was contested by defendants no.4 to 6 which included the present appellant Narender (defendant no.6) before this Court. In his written statement he had admitted that Anar Devi had executed a will dated 19.2.1972 in favour of Jai Lal; she was competent to do so; further her puja/sewa offerings were a part of her properties; this estate has devolved upon Jai Lal. These admissions are contained in paras 3,4,8,10 and 11 of the said written statement.

25. Kishan Chand (defendant no.1) another appellant had also contested the suit; he had filed his written statement jointly along with defendants no.2 and 3. Kishan Chand had moved an application before the first Appellate Court under Order 12 Rule 6 of the Code seeking a decree on admission; the said application had been rejected by the Court on 01.7.2005 holding it to be an abuse of process of the court, which order had attained a finality. It has not been challenged. Question of an incorrect appreciation of the said order does not now arise. Submission of the learned counsel for the appellant that the provisions of Order 11 Rule 2 of the Code would be applicable is misconceived; submission being based on the plea that since Jai Lal had applied for a succession certificate in proceeding no.146 of 1974 which had been granted to him, he had not made any specific averments about the puja/sewa offerings; he cannot now raise this plea. This argument has to be noted only to be rejected. The proceedings for the grant of

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succession certificate under Part X of the Indian Succession Act 1925 are a summary proceeding. The cause of action in a proceeding seeking a succession certificate is distinct and different from the cause of action in a suit for declaration as filed by Jai Lal.

26. Section 387 of the Indian Succession Act inter alia reads as follows:

> "387.Effect of decisions under this Act, and liability of holder of certificate thereunder.- No decision under this Part upon any question of right between any parties shall be held to bar the trial of the same question in any suit or in any other proceeding between the same parties, and nothing in this Part shall be construed to affect the liability of any person who may receive the whole or any part of any debt or security, or any interest of dividend on any security, to account therefor to the person lawfully entitled thereto."

This provision clearly states that a decision under this part upon any question of right between any parties will not bar the trial of the same question in any suit or proceedings between the same parties. Further the averments in Suit o.146/2005 were based on an order dated 1.2.1974 passed in Suit No.61/69 which again was an order passed on an interim application under Order XXII Rule 4 of the Code; it was not a conclusive finding. These averments do not in any manner amount to an admission.

27. Appellant Subhash Bhardwaj is claiming through defendant no.3 Nihal Chand who had been proceeded ex parte on 2.9.1975 which order has not been set aside. Attention has been drawn to para 28 and 29 of the impugned judgment wherein the submission of the learned counsel for the appellant has been noted that Anar Devi being a woman could not have bequeathed any share in the puja offerings of the Kalkaji Temple and she had herself no title to the same; the submission being that this argument although noted

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had not been answered in the impugned judgment. This vehement submission of the learned defence counsel is also without any merit. This is evident from the discussion in the following paragraphs.

28. In the first round of litigation before the Court of the Civil Judge five issues have been framed on 10.2.1972. Two additional issues were framed on 19.9.1977; all of which have been reproduced hereinabove. Suspicious circumstances about the execution of the will had been alleged by the defendants. These have been gone into in detail by the Trial Judge.

29. Under Section 63 of the Indian Succession Act the will shall be attested by two or more witnesses; each of whom has seen the testator signing or fixing his mark to the will in the presence of and direction of the testator; however, it shall not be necessary that more than one witness be present at the same time; no particular form of attestation is also necessary. To discharge this onus, the plaintiff had examined two witnesses of whom PW-1 Yogender Pal, PW-2 Mool Shanker are the attesting witnesses to the will. PW-4 Deen Dayal was the deed writer. PW-1 had on oath deposed that he had signed the will Ex.PW-1/A as an attesting witness on the request of Anar Devi in her presence. He has admitted that the deed was not drafted in his presence; further Anar Devi had put her thumb impression at points E and F in his presence. The points E and F were the thumb impression of Anar Devi affixed by her before the Sub-Registrar. PW-2 the second attesting witness had deposed that Anar Devi had put her thumb impression on the will, on page 2 and before the Sub-Registrar in his presence; the will was not written in his presence; it was type written; the will had

been read over to Anar Devi before she put her thumb impression; she was in healthy statement of mind. PW-4, deed writer, had made an entry regarding the will in his register; the thumb impressions were obtained by him of Anar Devi in his presence; the will was read over to her before she put her thumb impression.

30. Much emphasis has been laid by the learned counsel appearing for Ram Niwas Sharma that this will has not been duly executed as there are conflicting versions given by PW-1 and PW-2.PW-1 has admitted that Anar Devi had not thumb-marked at point B (which is the point of the execution of the will) in his presence; further the deed writer in one part of the testimony describes the colour of the ink of the thumb impression as black and in another place as blue. Veracity and authenticity of the document not having been established by clear and cogent evidence, a substantial question of law has arisen on its interpretation. For this proposition, the learned counsel has placed reliance upon the judgments of Supreme Court reported in (1994) 2 SCC 135 *Bhagwan Kaur Vs. Kartar Kaur;* (1962) 3 SCR 195 *Rani Purnima Debi Vs. Kumar Khagendra Narayan Deb* .

31. This submission of the learned counsel for the appellant is completely devoid of the force. None of the judgments apply to the facts of the instant case. In the first judgment there was clear contradiction noted by the Supreme Court of the attesting witnesses who had "turned turtle" in their cross-examination which had led the Court to hold that the provisions of Section 63 of Indian Succession Act and Section 68 of the Indian Evidence Act have not been adhered to ; further a mere registration of the will by itself is not sufficient to prove the will. So also were the facts in the

second judgment where also the Supreme Court had held that mere registration of a will, would not discharge the onus of proving this document.

32. In the instant case, both the Courts below i.e. the Trial Court as also the first Appellate Court by cogent and coherent evidence had held that the will was proved; the testimony of the two attesting witnesses as also deed writer had been taken into account. Merely because the plaintiff who was the beneficiary of the will had propounded the will and had paid the stamp duty was not sufficient to discard the document. The Trial Judge in its judgment dated 16.3.1985 had given a detailed finding in this regard while disposing of issue no.1. The suspicious circumstances alleged by the defendant had been discussed at length and rejected; they were held to be trivial in nature. It is worthy to note that none of the witnesses of the plaintiff namely PW-1,PW-2 and PW-4 had been given any suggestion by the learned defence counsel that the will is forged or fabricated. In fact counsel for Ram Niwas had not cross-examined any of these witnesses. The version of DW-7 Ashok Kashyap, the handwriting expert, was negatived; attention has also been drawn to the cross-examination of DW-7 wherein it has been noted that although the positives of the photographs i.e of the disputed and admitted signatures has been filed yet there were no negatives on the court record. No opinion was given by DW-7 on the thumb marks at points A, C, E and F of Ex.PW-1/A. The Courts below had held that the will of Anar Devi having been thumb marked by her in the presence of the attesting witnesses; she having been read over and understood the contents of the said document when she was in a sound disposing

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mind, had proved the said document.

33. It is relevant to state that this issue was decided as issue no.1 along with the other issues on 16.8.1985. Thereafter the first Appellate Court on 01.12.2007 had endorsed this finding. This judgment was passed by the Court of Additional District Judge. On 13.8.2009 the predecessor of this court remanded the matter back to Additional District Judge as it was held that the impugned judgment which was passed by Additional District Judge had only decided the two additional issues and the remaining five issues had not been gone into. Pursuant to these directions the judgment dated 19.2.2010 was passed by the Additional District Judge.

34. Vide the impugned judgment dated 19.2.2010, the Additional District Judge had vide a detailed discussion in paras 10 to 35 held that suspicious circumstances as alleged by the defendant stood not proved. The cogent and coherent evidence through the versions of PW-1, PW-2 and PW-4 had proved the will Ex.PW-1/A.

35. As already aforenoted, Anar Devi as widow of Chunni Lal in suit no.61/1969 had received her share of puja offerings along with other widows in the sum of Rs.20,833/-; this was in the year 1972. This position stands admitted by DW-1 in his cross-examination. The appellants before this Court were also parties in the proceeding which was a representative suit under Order I Rule 8 of the Code; no challenge had been made to the release of this money which was none other than the share of puja offerings of Anar Devi which had fallen to her share after the death of her husband. These puja offerings were received by her i.e. in her capacity as a woman.

36. It is not in dispute that the rights of shebiat offerings are

transferrable and is an inherited right. Contention of the appellants is that Anar Devi being a woman could not have inherited this right and since there was a custom which permitted her to accept this share, there was no evidence led by the plaintiff on this score showing her entitlement to do so.

37. In AIR 1984 SC 905 *R.Palanimuthu Vs. Returning Officer & Ors.* Supreme Court had held that a widow is entitled to succeed to the shebaiti rights left by her husband; on his death her limited estate comes under her absolute ownership under Section 14(1) of Hindu Succession Act 1956; such a right can be transferred by a will. This answers the contention raised by the learned counsel for the appellant. Anar Devi inherited this right of puja sewa from her husband; she could validly transfer the same; she had done so by virtue of the will executed by her in favour of Jai Lal. She was competent to bequeath this share which was her absolute property. It was for the appellants/defendants to have defied that there was no such prevailing custom; in the absence of which her averments had to be accepted.

38. Section 30 of the Hindu Succession Act 1956 enables a Hindu to dispose of by a will his or her right in property. Section 14 of the said Act specifically postulate that a property held by a hindu woman after the commencement of the Act is no longer held by her as a limited owner; she becomes a full owner of the said limited right which includes both immovable and movable properties. The impugned judgment had rightly endorsed the view of the Trial Court that the will executed by her on 17.2.1972 was a valid will wherein she was competent to bequeath her share in the puja sewa in the Kalkaji Temple in favour of Jai Lal. This was her absolute

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property.

39. The address on this finding more or less answers all the queries raised by the learned counsels for the appellants. The additional issues as aforenoted had been framed by the Court on 19.9.1977. They have been fact found not on one but on three occasions. On 16.8.1985 they were disposed of by the Court of Civil Judge wherein it was held that Ram Niwas Sharma was not the grandson of Anar Devi and he was not entitled to inherit her share. Evidence was scrutinized in detail. The onus to discharge these issues was on defendant no.7 Ram Niwas Sharma. He had claimed himself to be the grandson of Anar Devi. Testimony of DW-1 Ram Niwas Sharma as also his father Sohan Lal Sharma DW-7 had been delved into. It was not relied upon. The documentary evidence produced by the defendant had been scrutinized. The passport of Ram Niwas Sharma evidenced his date of birth as 1.10.1946 so also the affidavit Ex.DW-1/5 furnished by him. This was contrary to the date of birth recorded in his birth certificate Ex.DW-1/6 which had recorded his date of birth as 4.10.1946. The school leaving certificate had yet recorded another birth date which recorded the date of birth as 12.10.1946. On oath DW-1 had again given a different version which did not match his documentary evidence i.e. his passport and affidavit Ex. DW-1/5. On oath in Court he had stated that he was born on 4.10.1946. Provisions of Section 50 of the Evidence Act relied upon by learned counsel for the appellants had been adverted to; the relationship of DW-7 Sohan Lal Sharma with Ram Niwas Sharma had been examined and so also the version of DW-5 and DW-6 the neighbour and mausa of DW-7. These issues were decided against defendant

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no.7 and in favour of the plaintiff. This was in the first round of litigation which ended on 16.8.1985.

40. Thereafter an appeal was filed against the said judgment. On 9.4.1994, the Additional District Judge had remanded the case back to the Civil Judge for a fresh decision on the additional issues after permitting the parties to lead evidence.

41. On 31.5.2000 Civil Judge returned a fresh finding on the additional issues. The detailed findings are contained in para 13 onwards in the said judgment. These additional issues were decided after the statement of Ram Niwas Sharma was recorded as DW-8. Kamla Sharma was examined by interrogatories but thereafter she could not be cross-examined; her interrogatories were not taken into account. The factual findings were again detailed and delved into. The Court on 31.5.2000 again returned a finding that Ram Niwas Sharma is not the grandson of Anar Devi and he is not entitled to inherit her estate. Again these issues were decided against defendant no.7.

42. This was the subject of an appeal before the Additional District Judge who disposed it of on 01.12.2007. In this judgment after a detailed finding the judgment dated 31.5.2000 was reaffirmed.

43. These fact findings have since attained a finality and cannot now be agitated afresh. This Court as already noted is not a third fact finding court.

44. The judgments relied upon by learned counsel for the appellant Ram Niwas Sharma reported in (2004) 9 SCC 468 *Krishan Mohan Kul & Anr. Vs. Pratima Maity & Ors.;* (2002) 6 SCC 404 *Yadarao Dajiba Shrawane Vs. Nanilal Harakchand Shah & Ors.*

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and (2006) 5 SCC 545 *Hero Vinoth Vs. Seshammal* have been perused. These judgments deal with the scope of the powers of the second Appellate Court while hearing a second appeal. It is only when the Courts below have recorded a completely erroneous finding and ignored relevant documents which findings can be termed as perverse, can the second Appellate Court interfere in the findings of the Court below. In fact, what is a substantial question of law has been discussed in detail in the last judgment i.e. the judgment of *Hero Vinoth* (supra). The ratio of this judgment recites as follows:

> "23. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis. (See: Santosh Hazari v. Purushottam Tiwari.)"

45. There is no such substantial question of law which has arisen in this case. Findings of fact have been based on cogent and clear evidence; Courts below have after an in depth detail of the oral and documentary evidence concluded that the will had been validly executed by Anar Devi in favour of Jai Lal; Ran Niwas Sharma was not the grandson of Anar Devi; Ex. PW-1/A i.e. the will of Anar Devi

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had validly bequeathed her properties movable and immovable in favour of Jai Lal which included her right in the puja/sewa which she was in fact competent to bequeath.

46. The judgment relied upon by learned counsel for the appellant Narender reported in (2004) 5 SCC 551 *Transmission Corporation of A.P. Vs. Ch. Prabhakar & Ors.* based on the proposition that provision of Section 100 of the Code should not be applied in the instant case after the amendment of 1976 and should apply pre-amendment i.e. a right which has accrued to the appellant from the date of institution of the suit is a misconceived argument. The ratio of the judgment sought to be relied upon by learned counsel for the appellant is an attempt to misguide the Court. This was a writ petition where the amendment brought by the Andhra Pradesh Legislation in the Indian Electricity Act had been challenged with a direction that it be declared ultra vires with a further direction to transfer the criminal cases to the Court of the Special Metropolitan Magistrate for a trial in accordance with law. In para 18 of the said judgment the Court had opined that the right to appeal is a vested right which is to be governed by the law prevailing on the date of the institution of the suit and not by the law prevailing at the decision or at the date of filing of the appeal. This proposition had been enunciated by the Apex Court while dealing with the vires of a statute; whether it be declared valid or invalid; it has no application in the context of the instant situation.

47. The judgment relied upon by learned counsel for the appellant Subhash Bhardwaj reported in AIR 1980 SC 707 *Krishna Singh Vs. Mathura Ahir* states that succession to Mahantship of a

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Math or a religious institution is ordered by a custom or usage of that particular institution except where a rule of exception is laid down by the founder who has created the endowment. How and in what manner this judgment can be applied to the instant situation has not been explained or argued by the learned counsel for the appellant. Courts below had given concurrent findings that Anar Devi was competent to bequeath her share of puja offering in favour of Jai Lal; she had validly done so.

48. Fact findings cannot be interfered with at the second appeal level. No question of law much less any substantial question of law has arisen in the appeals. All the appeals as also the pending applications are dismissed in limine.

INDERMEET KAUR, J.

AUGUST 30, 2010
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