

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 25.2.2011

RFA No. 429/2004

Master Sachin Gupta & Anr. Appellants
Through: Mr.R.P.S. Sirohi, Advocate.

Vs.

Shri Chander Kishor Aggarwal & Ors. Respondent.
Through: Mr. Y.R. Sharma, Advocate for R-1
& 2.
Ms. Sana Ansari, Advocate for R-6.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

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

KAILASH GAMBHIR, J.

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1. By this appeal filed section 96 of the Civil Procedure Code, 1908 the appellant seeks to challenge the judgment and decree dated 17.4.2004 passed by the learned trial court whereby the suit filed by the appellants for possession, recovery of damages, declaration and perpetual injunction was dismissed.

2. Brief facts of the case relevant for deciding the present appeal are that the appellants/plaintiffs are minors and are represented by their mother Smt.Pushpa Devi in the suit filed by them for possession, recovery of damages, declaration and perpetual injunction in respect of the property bearing House No. 8/7, Roop Nagar, Delhi. Smt. Bimla Devi, the grandmother of the appellants/plaintiffs is untraceable since 18.1.93 and has left a Will dated 23.1.1985 making respondent no.5/defendant no.5, i.e her son Sh.Sunil Kumar who is the father of the appellants herein, owner of the said property without having the right to sell, mortgage or make any addition or alteration to it except having the right to live in the said property. The appellants have alleged that as per the said will they are the ultimate beneficiaries of the said property with all the rights and thus filed the said suit which vide judgment and decree dated 17.4.2004 was dismissed as being premature. Feeling aggrieved with the same, the appellants have preferred the present appeal.

3. As would be seen from the aforesaid facts, the said civil suit claiming decree for possession, declaration, perpetual injunction and recovery of damages was filed by the grand children of Smt. Bimla Devi based on a registered Will dated 23rd

January, 1985 proved on record as Ex. PW 1/3. Under the said Will, the suit property was to devolve on Shri Sunil Kumar Gupta, father of the appellants with the restricted right of life estate and thereafter the said property was to devolve upon the appellants in equal share with absolute rights. It has also not been disputed before the learned Trial Court and before the Appellate Court as well, that these appellants who were plaintiffs before the learned trial court sought to challenge the sale transaction entered into by Shri Sunil Kumar Gupta, respondent No. 5 herein to sell the second and third floor of the said property bearing No. 8/7, Roop Nagar, Delhi in favour of Shri Suresh Chand Gupta and Shri Arun Kumar Gupta, respondents No. 3 and 4 who in turn had sold the said property in favour of respondents No. 1 and 2. The right of respondent No. 5 to sell the property in favour of respondents No. 3 and 4 was disputed on two fold grounds; firstly that he could not have sold the said property as under the registered Will left by Smt. Bimla Devi the subject property was to devolve upon the appellants while respondent No. 5 only had a life interest in the same and secondly on the ground that respondent No. 5 was an under developed person because of some burn injuries sustained by him in his childhood and taking benefit of such disablement of

respondent No. 5, respondents No. 3 and 4, who were property dealers, induced him to enter into the said sale transaction. There has also not been any dispute that late Smt. Bimla Devi is not traceable since 18.1.1993 while the said suit was filed by the appellants on 19.5.1995. The learned trial court after a detailed discussion on all the issues reached to the conclusion that the suit filed by the appellants was premature. The learned trial court also found that on the date of the filing of the suit no presumption under Section 108 of the Evidence Act could have been drawn to presume the death of Smt. Bimla Devi and, therefore, the registered Will left by Smt. Bimla Devi could not have come into force at least till the expiry of 7 years period.

4. The learned trial court also found that it was not proved on record by the appellants that respondent No. 5 was of unsound mind and simply because he had received burn injuries during his childhood the same would not give rise to the presumption that he became a person of unsound mind. The learned trial court also found that even the appellants did not implead respondent No. 5 through “next friend” and rightly so since even the appellants themselves did not dispute the mental capacity of respondent No. 5 to execute the sale documents in

favour of respondents No. 3 and 4. The learned trial court also found that respondent No. 5 had been receiving rent from the tenants of the second floor property and even he had filed an eviction petition against the tenants for and on behalf of his mother Smt. Bimla Devi. The court further found that in the declaration form signed by respondent No. 5 for the admission of appellant No. 1 Master Sachin Gupta he disclosed his qualification as a Graduate having monthly income of Rs. 3,500/. In the face of all these admitted facts the learned trial court did not find any merit in the plea raised by the appellants that their father was suffering from legal disability which incapacitated him to execute the transfer documents in favour of respondents No. 3 and 4.

5. Without entering into any detailed discussion on the issues framed by the learned trial court, this Court could not get any satisfactory answer from the counsel for the appellants as to how the said suit could be maintained by the grand children. Admittedly even the period of 7 years to draw the presumption of death of Smt. Bimla Devi envisaged under Section 108 of the Indian Evidence Act was yet to expire from the date of her disappearance. The date of disappearance of Smt. Bimla Devi as

alleged by the appellants in the suit is 18.1.93 while the said suit was filed by the appellants on 19. 5. 1995. Unless a person dies a natural death, the presumption with the exception of principle of presumption of death as envisaged under Section 108 of the Indian Evidence Act lies in believing that a person is alive. Section 107 of the Indian Evidence Act deals with the presumption of continuous life while Section 108 deals with the presumption of death. Under Section 107 when the existence of a person is in question and if he is shown to have been living in a given time within a period of 30 years and there is nothing to suggest the probability of his death, presumption of such a person being alive will arise and such a presumption can be disapproved by a person who asserts and proves contrary to the same. So far as Section 108 of the Indian Evidence Act is concerned the presumption of a person being dead would arise only if such a person is continuously absent and is not heard of by all those who would have naturally heard of him had he been alive for a period of seven years. Again such presumption is rebuttable as the person can be proved to be alive if he appears on the scene after the lapse of 7 years period. In any case, no presumption can arise to believe that such a person is dead unless the said mandatory period of seven years as envisaged

under Section 108 of the Indian Evidence Act comes to an end. The Apex Court in the case of **LIC vs. Anuradha (2004)10 SCC 131** eloquently put the purport of the said sections in the following words:

"14. On the basis of the abovesaid authorities, we unhesitatingly arrive at a conclusion which we sum up in the following words. The law as to presumption of death remains the same whether in Common Law of England or in the statutory provisions contained in Sections 107 and 108 of the Indian Evidence Act 1872. In the scheme of Evidence Act, though Sections 107 and 108 are drafted as two Sections, in effect, Section 108 is an exception to the rule enacted in Section 107. The human life shown to be in existence, at a given point of time which according to Section 107 ought to be a point within 30 years calculated backwards from the date when the question, arises, is presumed to continue to be living. The rule is subject to a proviso or exception as contained in Section 108. If the persons, who would have naturally and in the ordinary course of human affairs heard of the person in question, have not so heard of him for seven years, the presumption raised under Section 107 ceases to operate. Section 107 has the effect of shifting the burden of proving that the person is dead on him who affirms the fact. Section 108, subject to its applicability being attracted, has the effect of shifting the burden of proof back on the one who asserts the fact of that person being alive. The presumption raised under Section 108 is a limited presumption confined only to presuming the factum of death of the person who's life or death is in issue. Though it will be presumed that the person is dead but there is no presumption as to the date or time of death. There is no presumption as to the facts and circumstances under which the person may have died. The presumption as to death by reference to Section 108 would arise only on lapse of seven years and would not by applying any logic or reasoning be permitted to be raised on expiry of 6 years and 364 days or at any time short of it. An occasion for raising the presumption would arise only when the question is raised in a Court, Tribunal or before an authority who is called upon to decide to whether a person is alive or dead. So long as the dispute is not raised before any forum and in any legal proceedings the occasion for raising the presumption does not arise."

6. In the facts of the present case, when only two years period had expired from the date of the disappearance of Smt. Bimla Devi, the said presumption could not have arisen in favour

of the appellants to believe the death of Smt. Bimla Devi. The appellants who are the grand children of Smt. Bimla Devi have claimed their right over the subject property under the registered Will dated 23.1.85 proved on record as Exhibit PW1/3 but the said Will could not have come into force till either the natural death of Smt. Bimla Devi or her presumptive death under Section 108 of the Indian Evidence Act. The appellants, therefore, could not have derived any legal right over the said property before the expiry of the said period. Once the said right was not well crystallized in their favour under the said registered Will, the suit filed by the appellants was rightly held to be premature by the learned trial court. This Court, therefore, does not find any infirmity, illegality or perversity in the order passed by the learned Trial Court.

7. There is no merit in the present appeal. The same is hereby dismissed.

February 25, 2011

KAILASH GAMBHIR, J