

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 01.07.2013

+ **LPA No. 1073/2011**

SMT. KIRAN DIWANIA

... Appellant

versus

FINANCIAL COMMISSIONER, DELHI & ORS... Respondents

Advocates who appeared in this case:

For the Appellant : Mr Raj Singh Mathur with Mr B.S. Kharb

For the Respondent Nos.1-4 : Ms Anjana Gosain

For the Respondent No. 5 : Mr Sumit Chandra

CORAM:-

**HON'BLE MR JUSTICE BADAR DURREZ AHMED, THE ACTING
CHIEF JUSTICE.**

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

JUDGMENT

BADAR DURREZ AHMED, ACJ

1. This Letters Patent Appeal is directed against the judgment dated 08.11.2011 delivered by a learned single Judge of this court in WP (C) 7837/2008 (Kiran Diwania v. Financial Commissioner and Others). The matter pertains to the entry in the record of rights in respect of 50 bighas, 16 biswas of land in village Galibpur, Delhi. The appellant claims that her name alone should have been recorded in the record of rights under the Delhi Land Revenue Act, 1954. She claims that her name should have

been so recorded on the basis of a Will dated 19.06.1967 which had been probated by virtue of an order of the District Judge, Delhi on 26.03.1993. The said Will was executed by Smt. Manbhari, who is the maternal grandmother of the appellant. Smt. Manbhari was married to Shri Ami Lal. Shri Ami Lal passed away in 1930 prior to the enactment of the Delhi Land Reforms Act, 1954. His widow (Smt. Manbhari) was regarded as a *Bhumidhar* under the Delhi Land Reforms Act. Smt. Manbhari died on 19.05.1968 leaving behind her daughter (Smt. Sunder) as her sole surviving heir. The appellant (Kiran Diwania) is the daughter of Smt. Sunder. The appellant also has a sister by the name of Ratan Bala. Shri Suraj Bhan (Respondent No.5) claimed that his name ought to be recorded in the record of rights under the Delhi Land Revenue Act inasmuch as he claimed under an alleged Will dated 12.09.1979 allegedly executed by Smt. Sunder, who, according to him, had inherited the rights as a *Bhumidhar* from her mother (Smt. Manbhari). Thus, while the appellant Kiran Diwania claims her right under the Will dated 19.06.1967 executed by Smt. Manbhari, Suraj Bhan (Respondent No.5) claims his right under the alleged Will dated 12.09.1979 allegedly executed by Smt. Sunder in his favour.

2. It would be pertinent to point out that the present appeal has arisen out of the revenue proceedings under the Delhi Land Revenue Act. It is not in dispute that upon the death of Ami Lal, Smt. Manbhari was the *Bhumidhar* in respect of the land in question. Smt. Manbhari died on 19.05.1968. Prior to her death, she had executed a Will on 19.06.1967 which was probated by a District Judge in Delhi on 26.03.1993. It may be relevant to point out that at the point of time when the Will was executed by Smt. Manbhari in favour of her grand-daughter (Kiran Diwania), the appellant herein, the latter was a minor and her guardian was her mother Smt. Sunder. In 1969-70, consolidation proceedings had been undertaken in, inter alia, the said village Galibpur. As per the *Khatauni Pamaish* of 1969-70, the name of the *Bhumidhar*, in respect of the said holding, was shown as “*Smt Sunder dukhtar Manbhari, Widhwa Ami Lal*” (Smt. Sunder, daughter of Manbhari, widow of Ami Lal).

3. It is alleged by Shri Suraj Bhan that Smt. Sunder, prior to her death on 27.06.1980, had executed a Will on 12.09.1979, by virtue of which, he inherited all the rights, title and interest of Smt. Sunder in the land in question. At this juncture, it may be pointed out that, while the Will executed by Smt. Manbhari has been proved by virtue of the probate order

dated 26.03.1993, the alleged Will of Smt. Sunder has not been probated nor is it claimed to be a registered Will. In fact, Suraj Bhan (Respondent No.5) had moved an application being MPC No.47/2001 in Probate Case No.106/1991 under Section 263 of the Indian Succession Act, 1925 for revocation of the letter of administration granted in favour of Smt. Kiran Diwania in respect of the estate of Smt. Manbhari alongwith the Will dated 19.06.1967. That application was rejected by an order dated 15.03.2003 passed by the learned Additional District Judge, Delhi. While doing so, the learned Additional District Judge, noted as under:-

“16. It has been proved on record and it has not been disputed by the applicant that he was not the legal heir either of Manbhari or Smt. Sunder. Smt Sunder is the daughter of Smt. Manbhari. Non-applicant Smt. Kiran Diwania and one Smt. Rattan were the two daughters of Smt. Sunder and grand daughter of Smt. Manbhari. The applicant has not even made a whisper in his application for revocation that the Will dated 19.6.1967 of Smt. Manbhari, in favour of non-applicant Smt. Kiran Diwania was not the genuine Will of Smt. Manbhari ...”

“18. Taking the case of the applicant from another angle, though the applicant was to prove the Will dated 12.9.79 of Smt. Sunder in his favour either in opposition to the will dated 19.6.1967 of Smt. Manbahri in respect of which letters of administration had been issued in favour of the non-applicant or in the appropriate proceedings for obtaining letters of administration, yet the applicant has preferred not even to file a copy of the Will in these proceedings. It was the non - applicant Smt. Kiran Diwania who filed a photocopy of the said Will purported to have been executed by Smt Sunder in

favour of the applicant, Suraj Bhan. Second paragraph of the Will would show that it contain averments by Smt. Sunder that she was not having any son or a daughter living and was, therefore, making Will in favour of Suraj Bhan, her cousin...”

4. After the death of Smt. Sunder on 27.06.1980, Shri Suraj Bhan (Respondent No.5) applied for mutation on the basis of the alleged Will dated 12.09.1979 purportedly executed by Smt. Sunder. At this juncture, it would be relevant to note that in the *Khatauni Pamaish* of 1977-78, the entry with regard to the *Bhumidhar* was to the following effect:-

“Sunder Daughter of and Manbhari, Widow of Ami Lal, in equal shares, resident of the village”

It is not, however, known as to how this entry came about. Be that as it may, Suraj Bhan (Respondent No.5) applied for mutation, as mentioned above. By an order dated 01.10.1982, the *Naib Tehsildar* allowed mutation of Smt. Sunder’s recorded half share in favour of Smt. Suraj Bhan (Respondent No.5) on the basis of the alleged Will dated 12.09.1979. It is also relevant to note that in the application for mutation filed by Suraj Bhan on 09.09.1982, he had made a false statement to the following effect:-

“My sister named Sunder, daughter of Late Shri Ami Lal, had no issue in her lifetime and as such had executed a ‘Will’ in my favour as I served her in her evening life in her old days”.

The above statement is false on at least three counts. First of all, Smt. Sunder was not Shri Suraj Bhan's sister. Secondly, Smt. Sunder had two daughters – Kiran Diwania (the appellant herein) and Ratan Bala. Thirdly, even the Will dated 12.09.1979 is not free from doubts.

5. Smt. Kiran Diwania had also applied for mutation in her favour. That application was decided by the SDM / Revenue Assistant (Punjabi Bagh) on 18.06.1990, whereby mutation of the recorded half share of Smt. Manbhari was done in favour of the appellant Smt. Kiran Diwania.

6. Being aggrieved by the order dated 18.06.1990, Shri Suraj Bhan moved an application for rectification before the Tehsildar, who called for the report of the *Halka Patwari* and *Kanungo*. Thereafter, by an order dated 31.08.1990, the *Naib Tehsildar* recommended review of the order dated 18.06.1990 before the SDM / Revenue Assistant. Around the same time, Smt. Kiran Diwania (the appellant) applied before the SDM / Revenue Assistant for cancellation of the mutation order dated 01.10.1982 granting mutation of the recorded half share in favour of Shri Suraj Bhan.

7. Smt. Kiran Diwania had also filed an appeal (Appeal No.149/1995) before the Additional Collector against the very same order dated

01.10.1982. While the proceedings initiated through the rectification application filed by Shri Suraj Bhan and the cancellation application filed by Smt. Kiran Diwania were pending before the SDM / Revenue Assistant, the Additional Collector proceeded with the appeal filed by Smt. Kiran Diwania being Appeal No.149/1995 and decided the same on 20.12.1995. By virtue of the said decision, the appeal was allowed and the Additional Collector held that Smt. Kiran Diwania was entitled to inherit under the Will dated 19.06.1967 executed by Smt. Manbhari. The order dated 01.10.1982, whereby mutation was granted by the Naib Tehsildar in favour of Shri Suraj Bhan (Respondent No.5) to the extent of Smt. Sunder's half share as recorded in the *Khatauni Pamaish* of 1977-78, was set aside.

8. Being aggrieved by the order dated 20.12.1995 passed by the Additional Collector, Shri Suraj Bhan filed a second appeal before the Financial Commissioner, who disposed of the same by an order dated 26.07.1996 whereby the order dated 20.12.1995 passed by the Additional Collector was set aside and the case was remanded to the SDM / Revenue Assistant (Punjabi Bagh) before whom, Smt. Kiran Diwania's application for cancellation of the mutation order dated 01.10.1982 and Shri Suraj Bhan's application for rectification of the order dated 18.06.1990 were also

pending. The Financial Commissioner directed the SDM / Revenue Assistant (Punjabi Bagh) to decide all the three matters together on facts and merits after hearing the parties. The SDM / Revenue Assistant disposed of the three matters by virtue of an order dated 29.09.2000 in Case No.377/1990. The SDM / Revenue Assistant held as under:-

“On the basis of arguments made by counsels of both the parties and the facts mentioned above it is revealed that both the parties failed to prove that entries made in the revenue record are wrong and no documentary proof is given by them. It is an undisputed fact that Smt. Manbhari had Willed her entire land in favour of Smt. Kiran Diwania and as such no share of land could be transferred by succession to her daughter Smt. Sunder. It is however, pertinent to note that Smt. Sunder had succeeded to 1/2 share of land through inheritance, inspite of the Will executed by her mother in favour of Smt. Kiran Diwania.

Apparently, the claim of Smt. Kiran Diwania to the succession of the remaining 1/2 share of suit land cannot be legally correct. Further, Smt. Sunder has executed a Will in favour of Shri Suraj Bhan, which has been allowed by the Naib Tehsildar vide order dated 01.10.82.

It is a settled law that a person cannot transfer a better title than he has. Since the genuineness or otherwise of the Will purported to have been made by Smt. Sunder is to be decided by a Competent Authority, various doubts have arisen during the course of the proceedings. This court is, therefore, of the view that 1/2 share land mutated in favour of Smt. Kiran Diwania vide order dated 18.06.90 is justified. The order of the Tehsildar, Najafgarh suffers from no weaknesses and, I accordingly accord the Will of Smt. Manbhari and the order is confirmed. Consequently, I order that, the land bearing Khasra Nos.4/22/1(4-9), 22/22/11 (0-7), 24/25(5-10), 25/3/2 (1-4), 8(4-16), 9(4-10), 10/1 (3-12), 11/2 (3-4) , 12(4-8), 13 (4-8) , 15/1

(2-12) , 19 (4-10), 20 (4-16), 162(1-0), 25/22/1 (0-12), 21/1(0-12), measuring 50 bighas 16 biswas to the extent of % share in the revenue estate of village Galibpur, be mutated in favour of Smt.Kiran Diwania and the appeal of Shri Suraj Bhan is hereby dismissed.”

9. Thereafter, cross appeals were filed by Smt. Kiran Diwania and Shri Suraj Bhan in respect of the order dated 29.09.2000 passed by the SDM / Revenue Assistant, Najafgarh, New Delhi in Case No.377/1990. Smt. Kiran Diwania claimed that she was entitled to have her name recorded in respect of the entire holding of 50 bighas 16 biswas. The reverse was claimed by Shri Suraj Bhan. Both the appeals were disposed of by an order dated 11.06.2004 passed by Shri S.S. Kanawat, Additional Collector, (South-West), District-Kapas Hera, New Delhi. The Additional Collector observed that the crux of the issue was whether the Will dated 19.06.1967 executed by Smt Manbhari in favour of Smt. Kiran Diwania was legal or not? The Additional Collector held that the Will executed by Smt. Manbhari was valid and, therefore, the order dated 01.10.1982 granting mutation of half share in favour of Shri Suraj Bhan was illegal. He also held that the order dated 18.06.1990 passed by the SDM / Revenue Assistant granting mutation in favour of Smt. Kiran Diwania only to the extent of half share in the said holding was bad and that Shri Suraj Bhan

had no right in the said holding and that the entire land ought to have been mutated in favour of Smt. Kiran Diwania.

10. Being aggrieved by the said order dated 11.06.2004, Shri Suraj Bhan preferred a second appeal under Section 66 of the Delhi Land Revenue Act before the Financial Commissioner. That appeal was decided by the Financial Commissioner on 17.10.2008. By that order, the Financial Commissioner set aside the order of the Additional Collector dated 11.06.2004. He upheld the order dated 01.10.1982 passed by the Naib Tehsildar, whereby mutation had been sanctioned in favour of Shri Suraj Bhan in respect of Smt. Sunder's half share. The Naib Tehsildar's recommendation for review of the order dated 18.06.1990 was also upheld and so was the appeal by Suraj Bhan.

11. Being aggrieved by the said order dated 17.10.2008, passed by the Financial Commissioner, Delhi, the present appellant (Smt. Kiran Diwania) filed the writ petition being WP(C) 7837/2008 which has been disposed of by the impugned order dated 08.11.2011 passed by a learned Single Judge of this court. By virtue of the impugned order dated 08.11.2011, the order dated 17.10.2008 passed by the Financial Commissioner, the order dated 11.06.2004 passed by the Additional Collector and the order dated

29.09.2000 passed by the SDM / Revenue Assistant were set aside. The learned Single Judge, however, directed the Revenue Assistant / SDM, Najafgarh or the concerned Revenue Assistant to take up Smt. Kiran Diwania's application under Section 26 of the Delhi Land Revenue Act afresh and, if a report thereupon under Section 23 of that Act has been obtained or is obtained subsequently, to act upon it and to invoke Section 186 of the Delhi Land Reforms Act, 1954 and to refer the question of title raised by the petitioner on the basis of the Will dated 19.06.1967 by Smt. Manbhari to the competent civil court to adjudicate upon its "genuineness" and to obtain the finding and thereafter to proceed expeditiously in accordance with law, that is, to promptly pass an order on the said application under Section 26 of the Delhi Land Revenue Act afresh. At the same time, the learned Single Judge directed that in the interregnum, the position obtaining prior to 1990 shall prevail, that is to say, that the existing mutation in favour of the respondent (Suraj Bhan) shall hold the field in terms of the order dated 01.10.1982. The appellant Smt. Kiran Diwania is aggrieved by these directions and is, therefore, in appeal before us.

12. In the impugned judgment dated 17.10.2008, the learned Single Judge noted that three questions of law had been raised in the writ petition.

Those questions were as under:-

- “(a) Is it not the duty of a revenue court to go into the genuineness of an un-registered and un-probated Will in the proceedings for mutation of title in the ‘Records of Rights’ even if the ‘Testator’ and the ‘Beneficiary’ are complete stranger to each other ?
- (b) Whether Tehsildar / Naib Tehsildar is vested with the powers of make recommendations for ‘Review’ of the orders passed by the court of Revenue Assistant during discharge of quasi-judicial function ?
- (c) Whether the revenue court can deny the mutation of title of agricultural land acquired by a person on the basis of 'Will' executed by a blood relation and probated by civil court of competent jurisdiction and attained finality after dismissal of revocation proceedings ?”

13. While the second question was not answered by the learned Single Judge in view of the findings returned on the other issues, the learned Single Judge did not specifically answer the first and third questions either. Anyhow, the view taken by the learned Single Judge was that the probate of the Will dated 19.06.1967 did not mean that the Will was genuine. In this context, the learned Single Judge had observed as under:-

- “6. Upon having heard learned counsel for the parties and on perusal of the impugned order and the material placed on

record, it transpires that perhaps it had escaped the attention of petitioner's counsel that in this very order of 15.3.2003 the *legal position regarding the genuineness of the Will is not to be gone into in the probate proceedings*, is noticed and so, any observation made in the said order would not clinch the issue of the genuineness of the Will dt. 12.9.1979 by Smt. Sunder in favour of the Respondent-Suraj Bhan.

7. It is settled position of law that the Probate Court is only concerned with the question as to whether the Will put forward as the last Will was duly executed and attested in accordance with law and at the time of its execution, whether the testator was having a sound mind. The probate Court is not at all concerned with the genuineness of the Will. Question of title are neither to be decided by the Probate Court, nor by the Revenue Fora. It is exclusively in the domain of the Civil Court to adjudicate upon the validity of the Will.”

14. While the learned Single Judge was correct in observing that the probate court is only concerned with the question as to whether the Will put forward as the last Will was duly executed and attested in accordance with law and at the time of its execution, whether the Testator was of sound mind or not, the learned Single Judge fell into error in observing that the probate court is not at all concerned with the genuineness of the Will. It appears that the learned Single Judge confused the issue of genuineness of the Will with that of devolution of title under the Will. Insofar as the question of a disputed title is concerned, that has to be considered by the

Civil Court. The probate court only determines the execution of the Will. The probate court is definitely concerned with whether the Will was genuine or not. The genuineness of the Will is not to be confused with the question of title. When the Testator himself does not have any title, even though the Will executed by him may be genuine, the title will not be transferred to the beneficiary under the Will. In the backdrop of the factual matrix of the present case, the Will dated 19.06.1967 has been found to be genuine and it is for this reason that it has been probated. Even the application for revocation of the Letter of Administration granted in favour of Smt. Kiran Diwania alongwith the Will dated 19.06.1967 has been rejected by the learned Additional District Judge by virtue of the order dated 15.03.2003. We have already alluded to the said order earlier in this judgment. Thus, insofar as the authenticity and genuineness of the Will dated 19.06.1967 is concerned, the same stands concluded by the orders passed by the probate court on 26.03.1993 and the order dated 15.03.2003.

15. The learned Single Judge also fell into error in observing that the revenue authority ought to have referred the matter to the Civil Court “to obtain a finding regarding the genuineness of the Will”. The learned Single Judge also directed that the revenue authorities ought to have resorted to

Section 186 of the Delhi Land Reforms Act inasmuch as a Will and a counter-will had been set up by the parties. We have already held that the genuineness of the Will, after the grant of probate by the District Judge, insofar as the Will dated 19.06.967 was concerned, was no longer open for discussion and debate. It is another matter as to what effect that Will would have had on the *Bhumidhari* rights of Smt. Manbhari and to what extent there was a transfer of the *Bhumidhari* rights of Smt. Manbhari to Smt. Kiran Diwania or to anybody else in terms of the provisions of the Delhi Land Reforms Act.

16. Insofar as the Delhi Land Reforms Act is concerned, it is apparent that Section 20 thereof requires that there should be record-of-rights for each village, subject to exceptions which may be prescribed. Section 22 provides for the reporting of a succession of transfer or possession. Sub-section (1) of Section 22 stipulates that, *inter alia*, any person obtaining possession as *Bhumidhar* or *Asami* by succession or by transfer of any land in village, which is required to be recorded in the register of the Record of Rights as per Section 20, is required to report such succession or transfer to the Tehsildar. On such report being made, the procedure to be adopted by the Tehsildar is prescribed under Section 23 of the Delhi Land Revenue

Act. The Tehsildar may also adopt the procedure prescribed therein upon facts which otherwise come to his knowledge. The Tehsildar is required to make an inquiry. In undisputed cases, if the succession or transfer appears to have taken place, the Tehsildar is required to direct the *Patwari* of the *Halka* to record the same in the annual register. However, in the case of a disputed succession or transfer or where the Tehsildar finds that it is in contravention of the provisions of Delhi Land Reforms Act, 1954, he is required to refer the case to the Revenue Assistant, who is to decide it after such inquiry, as may be prescribed and where necessary, direct the annual register to be amended accordingly.

17. It is apparent that Smt. Manbhari was a *Bhumidhar* as both parties, that is, Smt. Kiran Diwania as well as Shri Suraj Bhan are claiming their respective *Bhumidhari* rights through her. The issue to be examined was whether this was a case of succession insofar as Smt. Sunder was concerned or whether it was a case of devolution by way of a bequest, insofar as Smt. Kiran Diwania was concerned. Only if it were a case of succession, could Suraj Bhan claim the right by virtue of the alleged Will dated 12.09.1979 allegedly executed by Smt. Sunder in his favour. On the other hand, if the bequest by Smt. Manbhari in favour of Smt. Kiran

Diwania were to operate, then there was no question of Smt. Sunder obtaining any rights in the said holding inasmuch as the Will of Smt. Manbhari would operate immediately on her death on 19.05.1968 and would accrue to the benefit of Smt. Kiran Diwania. Smt. Sunder is alleged to have made the Will in favour of Suraj Bhan only on 12.09.1979 and she could have only made a bequest of what she had. At that point of time, if Smt. Manbhari's Will was to operate, Smt. Sunder would have had no right, title or interest in the said holding.

18. The issue in the present case, as pointed out earlier, is with regard to the record of rights under the Delhi Land Revenue Act. However, the persons entitled to have their names placed in the record of rights have to be determined in terms of the Delhi Land Reforms Act. Whenever there is a succession or transfer, it has to be in terms of the Delhi Land Reforms Act and if it is so, the same needs to be recorded in the annual register of the record of rights maintained under the Delhi Land Revenue Act. The issue is with regard to how the *Bhumidhari* right of Smt. Manbhari is to devolve. That issue has to be examined in the context of, *inter alia*, Sections 48, 50, 51, 53, as also the provisions of the Hindu Succession Act, 1956. Those provisions are to be examined before it can be determined as to who would

be entitled to have his or her name entered in the record of rights. But, it is not now open to the revenue authorities or the Civil Court to examine the issue with regard to the genuineness of the Will dated 19.06.1967 which, upon the grant of probate stands concluded. The execution of the Will by Smt. Manbhari in favour of Smt. Kiran Diwania is not open to challenge any further. Section 227 of the Indian Succession Act, 1925 specifically stipulates that the probate of a Will, when granted establishes the Will from the death of the Testator and renders valid all intermediate acts of the Executor as such.

19. Coming back to the facts of the present case, we find that when the application for mutation was made by Shri Suraj Bhan in 1982, there was no rival application on behalf of Smt. Kiran Diwania. The application from Smt. Kiran Diwania came much later and the order on that application was passed only on 18.06.1990. In this backdrop, it may appear that the directions given by the learned Single Judge that till the application under Section 26 of the Delhi Land Revenue Act for correction of the mistake or error in the annual register is decided, the existing mutation in favour of Shri Suraj Bhan by virtue of the order dated 10.01.1982 would hold the field, may appear to be reasonable. However, on examining the matter

further, we find that Shri Suraj Bhan, in his application for mutation, had made a clearly false statement that Smt. Sunder had no children. Therefore, Shri Suraj Bhan ought not to be permitted to take advantage of this patently false statement. Consequently, we dispose of the present appeal by holding that the genuineness of the Will dated 19.06.1967 is no longer in issue. The only issue is with regard to the transfer / succession of the *Bhumidhari* rights of Smt. Manbhari and in what manner the said Will dated 19.06.1967 would operate in the context of the provisions of the Delhi Land Reforms Act and the Delhi Land Revenue Act. It is obvious that if the Deputy Commissioner, examining the matter under Section 26 of the Delhi Land Revenue Act, feels it appropriate, then he may take resort to Section 186 of the Delhi Land Reforms Act and frame an issue on the question of title and submit the record to a competent civil court for a decision on that issue only.

20. We make it clear that we have purposely not determined the issue of title and in the present appeal inasmuch as it arose out of the proceedings of a revenue court which cannot decide issues of title. The present appeal is disposed of by modifying the impugned order dated 08.11.2011, as indicated above. To be clear, if a reference has to be made under Section

186 of the Delhi Land Reforms Act, 1954 by the Revenue Court, which would be examining the appellant's application under Section 26 of the Delhi Land Revenue Act, 1954 afresh, the same shall not include the question of genuineness of the Will. But, shall be limited to the question of title devolving by way of a bequest or through succession from Smt. Manbhari in terms of the provisions of the Delhi Land Reforms Act, 1954. Furthermore, the order dated 01.10.1982 is also set aside for the reasons indicated above.

21. As this matter has gone on for over three decades, we feel that the Deputy Commissioner should decide the application of the appellant for correction of the mistake or error in the annual register as expeditiously as possible and preferably within six months.

With these observations and directions, the appeal stands disposed of.

BADAR DURREZ AHMED, ACJ

SIDDHARTH MRIDUL, J

JULY 01, 2013

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