

\$~

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

+ **RFA(OS) 55/2016 & CM 24461/2016**

%

Reserved on: 13th September, 2017
Pronounced on: 27th October, 2017

LATE SH HARENDRA PAL SINGH THE LRS & ORS.

.....Appellants

Through: Mr. Anshu Mahajan, Mr.
Karan, Advs.

versus

RISHI PAL SINGH

..... Respondent

Through: Mr. Sandeep Sharma, Ms. Risha
Mittal, Mr. Bhriugu Dhami, Advs.

RFA(OS) 72/2016 & CM 34493/2016

**HARENDRA PAL SINGH (SINCE DECEASED THR. LRS)
& ANR.**

.....Appellants

Through: Mr. Anshu Mahajan, Mr.
Karan, Advs.

versus

RISHI PAL SINGH

..... Respondent

Through: Mr. Sandeep Sharma, Ms. Risha
Mittal, Mr. Bhriugu Dhami, Advs.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAVIN CHAWLA

SANJIV KHANNA, J.

This intra court appeal, RFA(OS) 55/2016 impugns order dated 2nd May, 2016 in CS(OS)1441/2008 and IA 10345/2010 passing a preliminary decree of partition holding that the respondent before us, the plaintiff in the suit, is 1/3rd owner of the second floor and above portion in the property bearing no. T-14, Green Park Extension, New Delhi (hereinafter referred to as 'suit property').

2. The suit property was originally owned by Padam Singh, father of Harendra Pal Singh, Rajendra Pal Singh, and Rishi Pal Singh. Harendra Pal Singh and Rajendra Pal Singh have expired and are now represented by their legal representatives. They are the defendants in the suit and appellants before us.

3. Chandra Kala Devi, wife of Padam Singh, had filed a civil suit CS(OS) 163/1980, impleading the three sons namely Harendra Pal Singh, Rajendra Pal Singh, and Rishi Pal Singh as defendants for declaration and injunction of the entire property i.e. T-14, Green Park Extension, New Delhi. The suit ended in a compromise decree dated 22nd October, 1980. The parties have not been able to trace out and place a copy of the plaint, written statement, compromise application, and the compromise decree dated 22nd October, 1980. It is stated that the suit file has been destroyed and parties do not have a copy of any of the aforesaid documents. However, a copy of execution application filed by Chandra Kala Devi against three sons namely, Harendra Pal Singh, Rajendra Pal Singh, and Rishi Pal Singh is on record. The prayers made in the said execution application read as under:-

“By way of issue of the warrants of attachment of J.Ds goods with a view to compel them to obey the terms of compromise or in any other manner in which this Hon’ble Court may deem fit and proper so that compromise effected between the parties may be implemented. Warrants of attachment of the moveable goods be issued against judgment debtors and further they may also be detained in civil prison so that they may be compelled to obey the decree passed by this Honourable Court.

If this Honourable court deems fit and proper then a Commissioner be appointed at the expenses of the JDs so that share of the decree holder may be divided or separated according to law.

That my other order or order as the Honourable Court deems fit and proper with a view to give effect decree in question may be passed in favour of the Decree Holder so that decree holder may be able to enjoy the fruits of the decree.

The costs of the present application be also allowed against the JDs.”

4. The aforesaid execution application was filed on 17th November, 1981.

5. The execution application resulted in another compromise agreement, relevant clauses of which reads as under:-

“(i) That rear portion shown in red colour shall be owned by Rishi Pal Singh exclusively i.e. ground floor with land beneath, first floor upto the level of ceiling, as no other party shall have any right title interest in the same in any manner.

(ii) That newly constructed first floor as has been shown in blue colour in the annexed site plan shall

be exclusively owned by Rajendra pal Singh as sole owner/landlord, no other party to present proceedings shall have any claim, right, title over the same in any manner.

(iii) That J.D. No.1 Shri H.P.Singh shall have all the ownership rights in respect of front Ground floor portion of the house No.T-14, Green Park Extension, New Delhi which has been shown in green colour in the annexed plan.

(iv) That barsati floor as has been shown in brown colour shall be owned by Decree Holder and her husband as sole owner/landlord till they are alive and thereafter it shall be devolved upon all the sons equally.

(v) That the common portion as has been shown in blank in the site plan shall be maintained by the parties in a joint way for common us.

(vi) That site plan shall be read as part and parcel of this deed.

(vii) That parties shall be bound by the terms and conditions of this compromise.

(viii) That none of parties to deed in question shall be entitled to sell their portion to any outsider except to the family members or their legal heirs. However, any of the parties shall be entitled to sell or transfer the same with the consent of all the parties to this deed, which has to be obtained in writing.

(ix) That Decree Holder, J.Ds, and parties to this deed shall also bear and include the express meaning of their legal heirs representatives, assign & representatives etc.

(x) That parties to the deed shall honestly and faithfully observe the above noted terms and conditions.”

6. This compromise agreement dated 11th January, 1983 was taken on record on 24th January, 1983 after recording statement of parties on 21st January, 1983 in the execution proceedings as per site plan Annexures Ex.C-1 and C-2. A reading of the compromise agreement would show that share of Rishi Pal Singh, Rajendra Pal Singh and Harendra Pal Singh was specially demarcated and shown in different colours in the site plan marked as Ex.C-2. Padam Singh, who was the registered owner of the entire property but was not a party to the suit CS(OS) 163/1980, was a party to the compromise agreement. The barsati floor, i.e. the suit property, shown in brown colour was to be owned by the decree holder i.e. Chandra Kala Devi and her husband Padam Singh as sole owner/landlord till they were alive and thereafter devolve on the sons equally.

7. The parties, it is apparent, had abided by the said settlement/compromise agreement till the death of Padam Singh on 16th August, 1996. Padam Singh, as per the respondent, had executed the Will dated 1st November, 1982 which has been placed on record. The Will, is idem with the compromise agreement dated 11th January, 1983, and similarly demarcates portions which were bequeathed to Rishi Pal Singh, Rajendra Pal Singh and Harendra Pal Singh. With regard to the constructed portion on the second floor, the Will records that the testator's wife Chandra Kala Devi, who was living with him, would inherit the newly constructed second floor consisting of two bedrooms, toilet, kitchen and any other additional construction that may be raised according to any building bye-laws as may be revised

thereafter, and also the mumty room, all shown in brown colour in the sketch attached and signed by him. The Will of Padam Singh is undisputed. The Will, unlike the compromise/settlement agreement dated 11th January, 1983, would come into effect on the death of Padam Singh on 16th August, 1996.

8. Chandra Kala Devi expired on 6th January, 1997.

9. The plaintiff, who is the respondent before us, had earlier filed a civil suit before the District Judge for possession, permanent injunction, restoration of legal and easementary right in respect of second floor i.e. the suit property, on 29th October, 2007. The prayers in the suit read as under:-

“Therefore in view of the above mentioned facts and circumstances, it is most respectfully prayed that this Hon’ble Court may be graciously be pleased to:

- a) Pass in decree of partition on 2nd Floor of the premises bearing no.T-14, Green park Extension, New Delhi-110016 and direct the defendants to hand over the peaceful possession of 2nd Floor in the light of the compromise decree;*
- b) Pass the decree of permanent injunction by restraining the defendants from erecting any wall in common portion of the premises in order to ensure free passage and access to front gate at all floors;*
- c) Pass the decree of permanent injunction by restraining the defendants from constructing or altering the common portions of the premises without the consent of the plaintiff.*
- d) Direct the defendants to restore any hurdle or obstacle from enjoying peaceful life in suit premises;*

- e) Direct the defendants to remove the blockage at the ground floor;*
- f) Award the cost of the suit of plaintiff and against the defendant company;*
- g) Any other orders or further order, which this Hon'ble Court deem fit and proper in the facts and circumstances of case and in the interest of justice."*

10. Paragraph 3 of the said plaint acknowledged that the entire property was divided as per the settlement with right to all parties to enjoy use of the common portions with the roof right. The defendants, who are the appellants herein, in the written statement had propounded a registered Will dated 27th September, 1996 executed by Chandra Kala Devi in respect of second floor i.e. the suit property and claimed that the suit property stood bequeathed exclusively to Shashi Singh, wife of Rajendra Pal Singh, who had expired earlier in 1994. In the written statement, challenge was made to the "partition" vide the settlement agreement dated 11th January, 1983 on various grounds including that the entire property belonged to Padam Singh, who was not a party to the civil suit No.163/1880 filed by Chandra Kala Devi against her three sons and that during his life time the entire property, which was immovable property, could not have been partitioned and valuable interests created by an unregistered settlement or compromise.

11. The respondent withdrew the civil suit vide application moved under Order XXIII of the Code of Civil Procedure, 1908, which was allowed vide order dated 11th July, 2008. This order records that the

plaint filed suffered from technical defects and the court lacked pecuniary jurisdiction. Permission/liberty was granted to the plaintiff to file fresh suit in accordance with law.

12. Copy of the application under Order XXIII for withdrawal of the suit placed on record states that the value of the second floor was about Rs.2 crores and inadvertently valuation of the suit for the purpose of court fees and jurisdiction had not been correctly made. The defendants, who are appellants herein before us, in the written statement had disputed the earlier compromise agreement with respect to the suit property on the ground lack of jurisdiction and hence being null and void, opening the entire suit property to a fresh partition.

13. The plaintiff thereafter, filed the suit CS(OS) 1441/2008, from which the present appeal arises. A reading of the plaint would show that the plaintiff had predicated his claim and had sought partition of the entire property, notwithstanding the earlier compromise agreement. The plaintiff has, apparently, given up reliance placed by him on the compromise agreement dated 11th January, 1983.

14. However, during the course of hearing of CS(OS)1441/2008, the plaintiff, it appears, changed his stand and placed reliance on the settlement agreement dated 11th January, 1983. The impugned order dated 2nd May, 2016 also proceeded on the said basis. It rejects arguments of the defendants that the compromise agreement dated 11th January, 1983 required registration and therefore, could not be binding on parties as an instrument of partition. Before us, the plaintiff has in fact urged and argued that the compromise agreement dated 11th

January, 1983 was in the nature of family settlement and would not require registration as held by the Supreme Court in *Som Dev & Ors. vs. Rati Ram & Anr.* 2006 (10) SCC 788. This decision also explains the scope and ambit of the ratio expounded in *Bhoop Singh vs. Ram Singh Major & Ors.* 1995 (5) SCC 709.

15. In our opinion, both the defendants and the plaintiff cannot challenge and question the division as stipulated in the compromise agreement dated 11th January, 1983 for two reasons. Even if we assume that the said settlement agreement required registration, parties had acted upon and accepted rights and interest of the parties in terms of the aforesaid settlement agreement from 1983 till 2007/2008. Parties have been enjoying the respective portions as per the said settlement agreement. Further even if the settlement agreement is to be ignored, the Will of Padam Singh dated 1st November, 1982, which is undisputed and unchanged on Padam Singh's death on 16th August, 1996, had the effect of demarcation and division of the entire property, giving respective portions to his three sons namely Harendra Pal Singh, Rajendra Pal Singh, both now deceased and represented by their legal representatives, and Rishi Pal Singh. Thus, whether we go by the family settlement or by the Will this position would be same. The Will had the effect of partition or of dividing the entire property into four parts.

16. In view of the aforesaid discussion, we are not required to examine the aforesaid demarcation or division or transfer to the three sons as the sons have acquired the rights in the respective portions in

view of the Will of Padam Singh dated 1st November, 1982. The question of registration of the settlement in this case, would be, therefore, of academic interest. The final position would be identical. To this extent, therefore, we do not see any reason and cause to interfere with the impugned order dated 2nd May, 2016.

17. This leaves us with the fourth portion i.e. the second floor or the suit property which as per the settlement agreement was shown in brown colour and was to be owned by Padam Singh and his wife Chander Kala Devi. We have already quoted Padam Singh's Will with respect to the second floor.

18. Counsel for the plaintiff has submitted that as per Ex.C-2 the brown portion consisted of the built up area and not the open terrace which had not been coloured and was to be treated as common area.

19. Counsel for the defendants submits that Padam Singh's Will refers to common use of the portions of the house left un-coloured. Thus, the counsel on the question of common area are ad- idem and as noticed above, the dispute is regarding the portion shown in brown colour in the settlement agreement as well as the Will of Padam Singh dated 1st November, 1982.

20. The impugned order does not examine the validity and genuineness of the Will dated 27th September, 1996 executed by Chandra Kala in favour of Shashi Singh, wife of Late Harendra Pal Singh. The judgments relied relate to compromise decree and it has

been held that Chandra Kala and even Padma Singh were bound by the said compromise agreement.

21. Section 14 of the Hindu Succession Act, 1956 reads as under:-

“14. Property of a female Hindu to be her absolute property.—

[\(1\)](#) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner. Explanation.—In this sub-section, “property” includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

[\(2\)](#) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.”

22. As interpreted in *Palchuri Hanumayamma vs. Tadikamalla Kotlingam & Ors* (2001) 8 SCC 552, where a Hindu woman has a pre-existing right, including right of maintenance, limited interest granted to her under a Will or document or even by a decree or order of Court, acquires and is treated as an absolute or full ownership right. This is

the effect of Section 14 (1) of the Hindu Succession Act, 1956. However, in the context of the present case, we need not refer to and rely upon the said dictum, as Chandra Kala Devi, as per the Will of her husband Padam Singh dated 1st November, 1982, had inherited the newly constructed second floor consisting of two bedrooms, toilet, kitchen and other additional construction, which would be thereafter raised and also the mumty room shown in brown colour in the sketch attached to the Will. Inheritance in her case as per the Will was as absolute owner.

23. The issue which would arise for consideration, is whether the compromise agreement dated 11th January, 1983 would have affected the aforesaid Will dated 1st November, 1982 of Padam Singh and had had the effect of creating a vested right in favour of the three sons, thereby rendering the purported and alleged Will of Chandra Kala Devi in favour of the appellants inconsequential.

24. To our mind, the answer to the question would depend upon whether the compromise agreement with reference to the *barsati* floor, which was shown in brown colour, had vested and had settled the ownership in the three sons, or the ownership rights had remained vested with Padam Singh and his wife Chandra Kala Devi. We have already quoted the relevant portion of the compromise/settlement agreement which, with reference to the *barsati* floor, had stated that it shall be owned by the decree holder i.e. Chandra Kala Devi and her husband Padam Singh, who shall be the sole owners/landlords till they were alive and thereafter, shall devolve upon the three sons. We may

also note that the compromise agreement had the effect of giving other portions in the property to the three sons.

25. The expressions “vested interest” and “contingent interest” have been defined in Sections 19 and 21 of the Transfer of Property Act, 1882 (hereafter referred to as the “TPA Act”). The said sections read as under:-

“19. Vested interest.—Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer. A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

XXXX

21. Contingent interest.—Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

(Exception) —Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.”

26. A person gets a vested interest in an immovable property where there is immediate right in present enjoyment or a present right for future enjoyment. An interest is contingent if the right of enjoyment is dependent upon an event which may or may not happen. When that event happens, the said contingent right becomes a vested right.

27. In *Rajesh Kanta Roy Vs. Santi Devi & Anr.*, AIR 1957 SC 255, distinction between “vested interest” and “contingent interest” as well as distinction between Sections 119 and 120 of the Indian Succession Act, 1925, on the question of Will or settlement, had come up for consideration before the Supreme Court with reference to a document in the form of compromise decree and it was observed, after referring to the textbooks, that the question really is one of the intention to be gathered from the comprehensive view of the document. It was observed that there is a bias in favour of the vested right unless an intention to the contrary is definite and clear. It was observed:-

"11. Now, there can be no doubt about the rule that where the enjoyment of the property is postponed but the present income thereof is to be applied for the benefit of the donee the gift is vested and not contingent. (See Explanation to Section 19 of the Transfer of Property Act, Explanation to Section 119 of the Indian Succession Act. See also *Williams*

on Executors and Administrators, 13th Edn., Vol. 2, p. 663, para 1010, and *Jarman on Wills*, 8th Edn., Vol. 2, p. 1397.) This rule operates normally where the entire income is applied, for the benefit of the donee. The distinguishing feature in this case is that it is not the entire income that is available to the donees for their actual use but only a portion thereof. But it is to be observed that according to the scheme of the trust deed, the reason for limiting the enjoyment of the income to a specified sum thereof, is obviously in order to facilitate and bring about the discharge of the debts. As already explained the underlying scheme of the trust deed is that the enjoyment is to be restricted until the debts are discharged. Whatever may be said of such a provision, where a donee is not himself a person who is under any legal obligation *aliunde* to discharge such debts, the position in this case is different. The two sons are themselves persons who, if the settlor died intestate, would be under an obligation to discharge his debts out of the properties which devolve upon them. It is only the surplus which would be legally available for division between them. In such a case, the balance of the income which is meant to be applied for the discharge of the debts is also an application of the income for the benefit of the donees. It follows that the entire income is to be applied for the benefit of the donees and only the surplus, if any, is available to the donees. Hence the provision in the trust deed that Lots I to IV are to devolve on Rajes and Lot V on Ramendra and that the surplus income of each of these lots after the discharge of the debts is also to devolve in the same way, clearly operates as nothing more than the present allotment of these properties themselves to the donees subject to the discharge of debts nationally in the same proportion. Thus taking the substance of the entire scheme of this division between the two sons the position that emerges is as follows: (1) Specified lots are earmarked for each of the two sons. (2) The present income out of those lots is to be applied for the discharge of the debts after payment of specified sums therefrom by way of monthly payments to the two sons and

presumably such application is to be notionally *pro rata*. (3) Any surpluses which remain from out of the income of each of the lots are to go to the very person to whom the corpus of the lot itself is to belong on the termination of the trust. (4) In the event of any of the two sons dying before the termination of the trust, his interest in the monthly payments out of the income is to devolve on his heirs. These arrangements taken together clearly indicate that what is postponed is not the very vesting of the property in the lots themselves but that the enjoyment of the income thereof is burdened with certain monthly payments and with the obligation to discharge debts therefrom notionally *pro rata*, all of which taken together constitute application of the income for his benefit.

12. It may be noticed at this stage that one of the features of a contingent interest is that if a person dies before the contingency disappears and before the vesting occurs, the heirs of such a person do not get the benefit of the gift. But the trust deed in question specifically provides in the case of *Rajes* — with whose interest alone we are concerned — that even in the event of his death it is his heirs (then surviving) that would take the interest. It has been urged that the provision in clause 12(a) in favour of the heirs *then surviving* is in the nature of a direct gift in favour of the heir or heirs who may be alive at the date when the contingency disappears. But even so, this would make no practical difference. It is to be remembered that in this case the parties belong to the *Dayabhaga* school of Hindu law — and this is admitted before us. It is also to be remembered that up to the third degree in the male line the principle of representation under the Hindu Law operates. The net result of the provision, therefore, is that whenever the alleged contingency of discharge of debts may disappear the person on whom the interest would devolve would, in the normal course, be the very heir (the lineal descendant then surviving or the widow) of *Rajes*. The actual devolution of the interest, therefore, would not be affected by the alleged

contingency. That being so it is more reasonable to hold that the interest of Rajes under the deed is vested and not contingent.

13. This view is confirmed by the fact that under the compromise decree which is now sought to be executed both the judgment-debtors, Rajes and Ramendra, created a charge for the monthly payment to Santi Debi and agreed to such charge being *presently executable*. This shows clearly that they themselves understood the interest available to them under the trust as a vested interest.”

28. In *Usha Subbarao Vs. B.N. Vishveswaraiah & Ors.*, 1996 (5) SCC 201, the Supreme Court had again examined this question with reference to a document called settlement deed which was treated as a Will by the High Court. The Supreme Court reversed the decision of the High Court that the document was a Will observing on reading of the recital and the schedule to the settlement deed, as also the clauses thereof, which had squarely indicated that the settlement deed was to take effect and had created rights thereunder immediately, i.e. on the date of execution. The demise had resulted in acquisition of absolute right of enjoyment, alienation etc. The Supreme Court referred to the settled principle that the executant, while divesting oneself of the title of the property, can create a life interest for his or her enjoyment, and the property shall devolve on the settlee on the settlor's demise. It was accordingly held that the document was not a Will as the executant had divested himself of his vested right thereunder.

29. These two judgments have been referred to by the Supreme Court in *P.K. Mohan Ram Vs. B.N. Ananthachary & Ors.*, (2010) 4 SCC 161, which also refers to several decisions from Madras High

Court, namely, *Gangaraju Vs. Pendyala Somanna*, AIR 1927 Madras 197, *Venkatasubramaniya Iyer Vs. Srinivasa Iyer*, AIR 1929 Madras 670 and *Ramaswami Naidu Vs. M.S. Velappan*, (1979) 2 MLJ 88. These decisions draw distinction and lay down principles as to how to determine whether the document is non-testimony in character i.e. it is a conveyance/settlement deed, or is in nature of a Will. The non-testimony document is one wherein personal interest is transferred. However, in some documents reserving a life interest, the line between a Will and conveyance, is a fine one. The test to be applied is of irrevocability i.e. whether the executants had reserved the right to revoke it. Every testator has right to revoke his Will and make a fresh Will under Section 62 of the Succession Act. It is the substance of the document as whole that matters and the form or nomenclature and various clauses are a guide as to whether there was immediate divestment of interest of the executants or the disposition was to take effect on the death. A vested right sometimes takes effect after the lifetime of the settlor as is clear from Section 19 of the TPA, which stipulates that vested interest is not defeated by the death of the transferee before he obtains possession. *P.K. Mohan* (supra) also makes reference to a Division Bench judgment of the Calcutta High Court in *Sagore Chandra Mondol Vs. Digambar Mondol*, (1909-10) 14 CWN 174, wherein it has been observed as under:-

“27. After noticing the contents of the documents, the Division Bench referred to *Vynior case* [Trin 7 Jac 1 Rot 2629 : 77 ER 595] and observed: (*Mondol case*[(1909-10) 14 CWN 174 : (1909) 9 Cal LJ 644] , CWN p. 177)

“As to the true character of the instrument propounded by the appellant we think there can be no reasonable doubt that it is a will. A will is defined in Section 3 of the Succession Act, 1925 as the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. Section 49 then provides that a will is liable to be revoked or altered by the maker of it, at any time when he is competent to dispose of his property by will. If, therefore, an instrument is on the face of it of a testamentary character, the mere circumstance that the testator calls it irrevocable, does not alter its quality, for as Lord Coke said in *Vynior case* [Trin 7 Jac 1 Rot 2629 : 77 ER 595] : (ER p. 600)

‘... if I make my testament and last will irrevocable, yet I may revoke it, for my act or my words cannot alter the judgment of the law to make *that* irrevocable, which is of its own nature revocable.’

(emphasis in original)

The principal test to be applied is, whether the disposition made takes effect during the lifetime of the executant of the deed or whether it takes effect after his decease. If it is really of the latter nature, it is ambulatory and revocable during his life. (*Masterman v. Maberly* [(1829) 2 Hag Ecc 235] and *Morgan, In re* [(1866) LR 1 P&D 214]) Indeed, the Court has sometimes admitted evidence, when the language of the paper is insufficient, with a view to ascertain whether it was the intention of the testator that the disposition should be dependent on his death. (*Robertson v. Smith* [(1870) LR 2 P&D 43]) Tested in the light of these principles, there can be no doubt that the instrument now before us is of a testamentary character. It is described as a will and states explicitly that as after the death of the testator disputes might arise among his relations with regard to the properties left by him, he made the dispositions to be carried into effect after his demise. The terms and conditions are then set out, paragraph by paragraph, and

in each paragraph, the disposition is expressly stated to take effect after his demise. Against all this, reliance is placed on the sixth paragraph, in which the testator says that he would be at liberty to mortgage the properties and not to sell them absolutely. Such a restraint as this upon his own power of alienation during his lifetime would be obviously void. It does not indicate any intention to make the deed irrevocable.”

30. We have come across a judgment of Patna High Court in ***Ramautar Singh Vs. Ramsundari Kur and Ors.***, AIR 1959 Patna 585, which dealt with a composite document in the form of gift deed and Will, i.e. partly a gift and a Will. The gift was made irrevocable in favour of the nephew during the lifetime of the executant, who was also the testator. This judgment refers to decision of the Supreme Court in ***Gnambal Ammal Vs. Raju Ayyar***, AIR 1951 SC 103 and warns that it is seldom profitable to compare the words of one Will with those of another, or to attempt to find out which Wills, subject of decisions, approximates closely to the Will in question. The cardinal maxim which is applied while construing a Will or document is to endeavour to ascertain the intention of the testator or the executants which is primarily to be gathered from the language of the document without indulging in conjecture or speculation as to what would have been done if the testator or executant was better informed or advised. The courts, however, are entitled to or bound to bear other matters in mind i.e. surrounding circumstances, than merely the words used. Courts often apply armchair test in case of a Will.

31. Instrument “Will” as defined in Section 2 (h) of the Indian Succession Act, 1925 means legal declaration of intention of the

testator in respect of his property which he desires to be carried into effect after his death. It means dispossession which is to take effect on death of the person. In other words, Will comes into effect and vigour upon the testator's death. A settlement is a dispossession, which takes effect during the life time of the executor of the deed. As already noted above under Section 62 of the Indian Succession Act, a Will is liable to be revoked or altered by the maker at any time before his death. A testamentary intention, therefore, is ambulatory till death. A Will, by its very nature, is a revocable instrument. Two characteristics must be satisfied in case of a Will. Firstly, it must be intended to come into effect after the death of the testator. Secondly, it must be revocable.

32. In the light of the ratios in the aforesaid decisions, we would determine whether the compromise agreement dated 11th January, 1983 must be construed and treated as creating a vested right and a transfer in praesenti in favour of the three sons to be effective on death of Padam Singh and Chandra Kala Devi, i.e. the enforcement of the right of ownership vested in the three sons was postponed. The said document would be a composite document i.e. settlement deed as well as a Will or declaratory. As noted above, the courts, while examining a document, would lead in favour of vested right, unless the wording of the document and the circumstances state to the contrary. In respect of the portions divested, possession handed over to the three sons who had acquired rights. In the present case, in respect of the fourth portion i.e. the suit property, we would hold that ownership right was not divested and had continued to remain with Padam Singh and Chandra Kala Devi. Clause 4 of the settlement agreement specifically states that

the decree holder and her husband were the sole owners/landlords. They were to continue to be the sole owners/landlords till they were alive and after that their sons would inherit the said portions equally. Clause 5 states that the common portion as shown in blank shall be maintained by all the parties jointly for common use. Clause 8 is equally relevant and important for it states that none of the parties to the deed shall be entitled to sell their portion to an outsider except to the family members or their legal heirs. It is further agreed that the parties would be entitled to sell or transfer the same with the consent of all the parties to the deed, which shall be obtained in writing. Lastly, clause 9 states that decree holders, judgment debtors and parties to the deed shall bear and include their legal heirs, representatives, assignees etc.

33. Given the aforesaid legal position and the terms of the deed, it has to be held that the settlement deed dated 11th January, 1983 in respect of the suit property owned by Padam Singh and Chandra Kala Devi, had not created any vested right in praesenti including any right in the form of right which could be enforced in future. The legal position, which emerges, therefore, is that Chandra Kala Devi had the ownership right in the suit property which she had acquired upon the death of her husband. The three sons had not acquired any vested right on the brown colour *barsati* floor, which can be enforced on the death of their parents. Chandra Kala Devi could have executed a Will but we cannot say with certainty whether Chandra Kala Devi had in fact executed a valid Will dated 27th September, 1996, as relied upon by the defendants, the appellants before us.

34. We have in the aforesaid discussion not decided the question whether or not the settlement agreement dated 11th January, 1983 required registration in respect of the fourth portion. The reason is that Padam Singh was certainly the registered owner of the entire property including the fourth portion. Thus for right qua this portion, no registration was necessary. By the settlement agreement dated 11th January, 1983, he had co-opted his wife Chandra Kala Devi as a joint owner. Padam Singh having predeceased Chandra Kala Devi, it is an accepted position that Chandra Kala Devi had inherited the suit property from Padam Singh as per the undisputed Will dated 1st November, 1982. We have interpreted the compromise agreement dated 11th January, 1983 and held that it had not resulted in transfer / divesting of ownership rights *in praesenti* in the fourth portion in favour of the three sons to be enjoyed after the death of Padam Singh and Chandra Kala Devi. Thus, even if the compromise agreement dated 11th January, 1983 is held as a legal and a valid document which did not require registration, the plaintiff, who is the respondent before us, had not acquired any right by virtue of the said document.

35. In view of the aforesaid position, the present appeals have to be allowed and we set aside and quash the preliminary decree observing that till the question of Will dated 27th September, 1996, purportedly executed by Chandra Kala Devi, is decided, the share of the parties cannot be determined and decided. Secondly, the final decree passed by the single Judge directing sale of the second floor of the property and distribution of the sale proceeds amongst the parties as per their share in terms of the preliminary decree, as a sequitur, is also set aside.

The appeals are allowed to the limited extent indicated above without any order as to costs.

36. The parties will appear before the single Judge on 21st November, 2017, when a date of hearing will be fixed.

-sd-

SANJIV KHANNA, J

-sd-

NAVIN CHAWLA, J

OCTOBER 27th, 2017
RN/NA/ssn



नित्यमेव जयते