

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

% **Date of decision: 14th July, 2017**

+ **CM(M) No.669/2016 & CM No.24721/2016 (for stay).**

PRITAM SINGH

..... Petitioner

Through: Mr. Arun K. Yadav, Adv.

Versus

SURENDER KUMAR & ORS

..... Respondents

Through: Mr. Atul Kumar Aggarwal, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The following order was passed in this petition yesterday:-

"1. This petition under Article 227 of the Constitution of India impugns the order dated 11th May, 2016 of the Additional District Judge-12 (Central) Tis Hazari Courts, Delhi in CS No.214/14 allowing the application of the respondents / plaintiffs for amendment of the plaint.

2. The petition was entertained and vide ex parte order dated 20th July, 2016 the proceedings before the Trial Court stayed.

3. The counsel for the respondents / plaintiffs appears.

4. The counsels have been heard.

5. What emerges is that (i) the respondents / plaintiffs instituted the suit from which this appeal arises, for partition of immoveable properties against one Maina Devi and the petitioner / defendant Pritam Singh; (ii) Maina Devi was the mother of the petitioner / defendant Pritam Singh and of deceased Krishna Devi and whose husband and children are the respondents / plaintiffs in the suit; (iii) the suit was for

partition of the properties left behind by the husband of Maina Devi and who was the father of the petitioner / defendant Pritam Singh and Krishna Devi aforesaid; (iv) both petitioner / defendant Pritam Singh and Maina Devi contested the said suit for partition; (v) Maina Devi died during the pendency of suit, in the year 2010, and recording that the petitioner / defendant Pritam Singh represented her estate, the name of Maina Devi was deleted from the array of defendants in the suit; (vi) the respondents / plaintiffs in or about the year 2016 i.e. six years after the demise of Maina Devi and when the suit was pending at the stage of final arguments filed an application for amendment of the plaint to plead that they had then discovered a Will of Maina Devi in favour of Krishna Devi; the respondents / plaintiffs thus wanted to contend that the 1/3rd share of Maina Devi in the property had also fallen to the share of the respondents / plaintiffs and the respondents / plaintiffs were thus entitled to 2/3rd share in the properties of which partition was sought and the petitioner / defendant Pritam Singh was entitled to only 1/3rd share in the properties; and, (vii) the petitioner / defendant Pritam Singh controverts that there is any such Will of Maina Devi.

6. The learned Additional District Judge has allowed the amendment observing that the pleas sought to be taken by way of amendment were subsequent events and the amendments were necessary for proper adjudication of the matter in controversy.

7. The counsel for the petitioner / defendant Pritam Singh has argued (i) that the respondents / plaintiffs as an afterthought had forged and fabricated the Will of

Maina Devi; (ii) the same is evident from the alleged Will having been set-up six years after the demise of Maina Devi; and, (iii) that the suit was at the stage of final arguments and amendment ought not to have been allowed at that stage.

8. *Section 105 of the Indian Succession Act, 1925 provides that if the legatee does not survive the testator, the legacy cannot take effect and lapses.*

9. *Krishna Devi having predeceased Maina Devi, I have enquired from the counsels, whether there is any provision in the alleged Will, of bequest of the properties to the heirs of Krishna Devi in the event of Krishna Devi predeceasing Maina Devi.*

10. *The counsel for the respondents / plaintiffs states that there is no such provision in the Will.*

11. *Once there is no such provision in the Will, even if Maina Devi left a Will bequeathing her share in the properties to Krishna Devi, Krishna Devi having predeceased Maina Devi, the said Will is of no avail and Maina Devi will be deemed to have died intestate. In this view of the matter the need to allow evidence to be led on the said plea is not felt.*

12. *The learned Additional District Judge has not considered the said aspect while allowing the application for amendment.*

13. *However the copy of the Will is not on record. Neither counsel has a copy in his possession.*

14. *It is deemed appropriate to grant an opportunity to the counsels to produce the Will / its copy so that this Court can peruse the language thereof.*

15. *List on 14th July, 2017."*

2. The counsel for the respondents / plaintiffs in compliance of the above has handed over a certified copy of the Will dated 6th June, 1979

of Maina Devi and relying whereupon the respondents / plaintiffs had sought amendment of the plaint and against allowing of which amendment this petition has been preferred. The said documents are taken on record.

3. The relevant part of the said document is as under:-

“As such I bequeath my entire one third at present undivided shares in the above mentioned houses to my minor daughter Kumari Krishna. In case any partition of the above mentioned houses takes place before my death in that case the house or property falling to my share in partition shall go as a bequest to my said daughter Kumari Krishna on my demise. Shri Pritam Singh my, now minor son, shall never have any right, title or interest, in my share of the above mentioned properties. I am making this Will in perfect sound disposing mind without any pressure or influence from any quarter. The contents of this Will have been fully explained to me and I have accepted them as correct before putting my thumb impression and signatures on this Will in the presence of witnesses who have themselves signed in my presence, being present throughout during the completion of this Will made on this 6th day of June, 1979 at Delhi.”

4. Section 105 of the Indian Succession Act, 1925 is as under:-

“105. In what case legacy lapses.”-(1) If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the Will that the testator intended that it should go to some other person.

(2) *In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.*

Illustrations

(i) *The testator bequeaths to B "500 rupees which B owes me". B dies before the testator; the legacy lapses.*

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

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

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

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

(vi) *The testator and the legatee perished in the same shipwreck. There is no evidence to show which died first. The legacy lapses."*

5. The language, as set-out hereinabove of the document claimed to be the Will of Maina Devi, does not indicate that Maina Devi intended that the legacy which was bequeathed thereunder to Krishna Devi should go to any other person.

6. Thus Section 105 would apply and upon Krishna Devi predeceasing Maina Devi, the bequest in favour of Krishna Devi in the

document aforesaid, even if proved to be the validly executed last Will of Maina Devi, would lapse and not enure to the benefit of heirs of Krishna Devi.

7. Though the language of Section 105 being unambiguous, does not require any interpretation, but reference in this regard can also be made to *S. Jhansi Lakshmi Bai Vs. Pothana Apparao* (1969) 2 SCC 91 and *Rajesh Khanna Vs. Asha Mehra* 2010 (117) DRJ 63 which put the position beyond any pale of controversy.

8. It thus transpires that the plea which has been allowed by way of amendment, even if were to be proved, cannot vest in the respondents / plaintiffs the share of Maina Devi in the properties of which partition is sought. Thus no purpose will be served in allowing the respondents / plaintiffs to lead any evidence to prove the document claimed to be the Will of Maina Devi.

9. It is however not deemed appropriate to set-aside the order of amendment. It is settled principle of law that the Court, at the stage of consideration of application for amendment is not to go into merits of amendment. Also, as the respondents/ plaintiffs, in future, cannot be denied the benefit if any available to them of the document claimed to be the Will of Maina Devi.

10. The counsel for Maina Devi at this stage states that even if the respondents / plaintiffs, inspite of being the legal heirs of Krishna Devi, owing to Section 105 supra are not to inherit the legacy which Maina Devi bequeathed to Krishna Devi, the aforesaid document bars petitioner / defendant Pritam Singh from inheriting the estate of Maina Devi. He thus proposes that the properties of which partition is sought be divided

equally between the petitioner / defendant Pritam Singh on the one hand and the respondents / plaintiffs on the other hand.

11. The counsel for petitioner / defendant Pritam Singh is not agreeable.

12. I have enquired from the counsel for the petitioner / defendant Pritam Singh the defence to the claim of the respondents / plaintiffs for partition.

13. No plausible defence has been disclosed. However the counsel for the petitioner / defendant Pritam Singh states that the parties can be sent to mediation.

14. That will be in the domain of the Suit Court.

15. The counsel for the respondents / plaintiffs states that the respondents / plaintiffs will file another application for amendment of the plaint to take the plea of the petitioner / defendant Pritam Singh under the document aforesaid being barred from inheriting the estate of Maina Devi.

16. A perusal of the application for amendment, against the order of allowing whereof this petition is preferred, shows that the respondents / plaintiffs therein claimed the 1/3rd share of Maina Devi as heirs of Krishna Devi to whom under the document aforesaid Maina Devi had bequeathed her share and not on the ground of petitioner / defendant Pritam Singh being disinherited thereunder. If the respondents / plaintiffs file any fresh application for amendment, it will be upto the Suit Court to consider the same.

17. Accordingly, this petition is disposed of by directing (i) that no evidence is required to be led by either party on the pleas permitted by

way of amendment vide order dated 11th May, 2016; (ii) the respondents / plaintiffs however will have liberty to file another appropriate application in the light of what has surfaced in this order; and, (iii) unless such an application is made, the learned Additional District Judge to proceed to hear final arguments in the suit and decide the suit.

RAJIV SAHAI ENDLAW, J.

JULY 14, 2017
'pp'..

