

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

+ **RFA No. 72/2018**

% **24th January, 2018**

SHASHI BAHADUR & ANR. Appellants

Through: Mr. Akhil Sachar and Ms.
Gayatri Nandwani, Advocates.

versus

MALKA BAHADUR (SINCE DECEASED) THROUGH HER L.R.

ABHA NARAIN (SINCE DECEASED) THROUGH HER LR.s.

..... Respondents

Through: Ms. Amrita Sanghi and Mr.
Akshay Sharma, Adv.s. with
respondents in person.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

Caveat Nos. 50-51/2018

Counsel appears for the caveators. Caveats accordingly stand
discharged.

**RFA No.72/2018 & CM No. 2749/2018 (stay) & CM No. 2750/2018
(seeking summoning of the trial court record) and CM No.
2751/2018 (Exemption)**

1. This Regular First Appeal under Section 96 of the Code
of Civil Procedure, 1908 (CPC) is filed by the defendant no.1 in the
suit impugning the judgment of the trial court dated 12.10.2017 by

which the trial court has decreed the suit filed for partition and has passed a preliminary decree as under:-

“30. Relief:

In view of my above findings and the reasons preliminary decree suit in respect of suit property bearing no.D-330, Defence Colony, New Delhi, is passed declaring the share of the parties as under:

- (i) Ms. Rajika Narain and Ms. Rasika Narain (plaintiffs) shall get 6/9th share in the suit property.
 - (ii) Ms. Shashi Bahadur (defendant no.1) shall get 2/9th share in the suit property.
 - (iii) Sh. Ranjit Bahadur (defendant no.2) shall get 1/9th share in the suit property.
 - (iv) Plaintiffs are also entitled to have true and correct account of the income fetched from the suit property and the manner in which the said income has been dealt with after the death of late Sh. R.S. Bahadur.
- Ordered accordingly.”

2. Parties are the family members of the original plaintiff Smt. Malka Bahadur who was the widow of late Sh. R.S. Bahadur. Defendant no.1 in the suit and who is the appellant no.1 in this Court is the daughter-in-law of the original plaintiff Smt. Malka Bahadur as she is the widow of Sh. Jitender Bahadur son of Smt. Malka Bahadur and Sh. R.S. Bahadur. Defendant no.2 in the suit and the appellant no.2 herein is the son of the appellant no.1/defendant no.1 being the son of late Sh. Jitender Bahadur. I may note that suit was originally filed by Smt. Malka Bahadur against her daughter-in-law being the appellant no.1/defendant no.1 and her grandson being appellant

no.2/defendant no.2 seeking partition of the suit property bearing no. D-330, Defence Colony New Delhi, however during the pendency of the suit the original plaintiff/Smt. Malka Bahadur expired and her daughter Smt. Abha Narain, who was the defendant no.3 in the suit was transposed as a plaintiff on the basis of a registered Will dated 5.5.1999 executed by the deceased plaintiff/Smt. Malka Bahadur in favour of her daughter Smt. Abha Narain. Smt. Abha Narain also expired during pendency of the suit on 29.9.2004 and she was thereafter substituted by her two daughters who became the plaintiffs and are hence the respondents in this appeal. Reference in this judgment to the plaintiff will include, wherever context so requires, reference to the original plaintiff or the present respondents who are the daughters of Smt. Abha Narain, daughter of the original plaintiff Smt. Malka Bahadur.

3.(i) It is undisputed that Sh. R.S. Bahadur created an HUF, by throwing the suit property in common hotchpotch in terms of his declaration dated 11.5.1970/Ex.PW1/2. Sh. R.S. Bahadur expired on 11.6.1977. In view of Sh. R.S. Bahadur expiring intestate on 11.6.1977, and there existing an HUF, and that Sh. R.S. Bahadur died

leaving behind a female heir specified in Class-I of the Schedule of the Hindu Succession Act, 1956 consequently, in view of Section 6 of the Hindu Succession Act on the death of Sh. R.S. Bahadur there was deemed to have taken place a partition in the family with such shares falling to the parties which were their shares in the HUF property just before the death of Sh. R.S. Bahadur. This is the law in view of Section 6 of the Hindu Succession Act as interpreted in the judgment of the Supreme Court in the case of *Uttam Vs. Saubhag Singh and Others (2016) 4 SCC 68*.

(ii) It is also settled law in view of the judgment of the Supreme Court in the case of *Gurupad Khandappa Magdum Vs. Hirabai Khandappa Magdum and Others (1978) 3 SCC 383* that though ordinarily a female does not have a right in an HUF property (i.e the position prior to the amendment of Section 6 of the Hindu Succession Act by the Amending Act of 2005 whereby daughters were given a share) however the widow of the Karta on partition gets a share equal to that of a coparcener in an HUF. Accordingly, the widow of late Sh. R.S. Bahadur and who was the original plaintiff in the suit would have share equal to the coparcener.

(iii) On the death of Sh. R.S. Bahadur there were three members of the HUF of late Sh. R.S. Bahadur namely Sh. R.S. Bahadur himself, his widow Smt. Malka Bahadur (being the original plaintiff in the suit) and the son Sh. Jitender Bahadur and each of the three persons got $\frac{1}{3}^{\text{rd}}$ share in the HUF property. Since admittedly Sh. R.S. Bahadur died intestate consequently the $\frac{1}{3}^{\text{rd}}$ share of Sh. R.S. Bahadur would be equally divided between the legal heirs of Sh. R.S. Bahadur. The legal heirs of Sh. R.S. Bahadur on his death were his widow Smt. Malka Bahadur, his son Sh. Jitender Bahadur and daughter Smt. Abha Narain/Smt. Abha Bahadur. Each of these three persons being Smt. Malka Bahadur, Sh. Jitender Bahadur and Smt. Abha Narain got $\frac{1}{3}^{\text{rd}}$ out of the $\frac{1}{3}^{\text{rd}}$ share of Sh. R.S. Bahadur i.e $\frac{1}{9}^{\text{th}}$ share each of the share of Sh. R.S. Bahadur was given to his widow Smt. Malka Bahadur, his son Sh. Jitender Bahadur and his daughter Smt. Abha Narain. Till this stage there is no dispute that the original plaintiff Smt. Malka Bahadur would get $\frac{1}{3}^{\text{rd}}$ share plus $\frac{1}{9}^{\text{th}}$ share, Sh. Jitender Bahadur would get $\frac{1}{3}^{\text{rd}}$ plus $\frac{1}{9}^{\text{th}}$ share and Smt. Abha Narain would get $\frac{1}{9}^{\text{th}}$ share.

4.(i) Disputes however arose between the parties on account of *pendente lite* death of the original plaintiff Smt. Malka Bahadur inasmuch as the daughter Smt. Abha Narain set up a registered Will dated 5.5.1999 whereby Smt. Malka Bahadur/mother bequeathed her share in the suit property i.e $1/3^{\text{rd}} + 1/9^{\text{th}}$ to Smt. Abha Narain. Smt. Abha Narain got herself substituted and transposed as plaintiff in terms of the order of the trial court dated 8.10.2000. Smt. Abha Narain also died *pendente lite* on 29.9.2004 and her daughters being the present respondents were hence substituted as plaintiffs in the suit. Respondents/daughters of Smt. Abha Narain pleaded existence of the Will dated 28.4.2004 in their favour and which Will also has been proved during the pendency of the suit as Ex.PW1/5, however, the proof of this Will is immaterial because admittedly the two respondents are the daughters of deceased Smt. Abha Narain and in any case would succeed to the share of Smt. Abha Narain and even if there was no Will of Smt. Abha Narain.

(ii) We are therefore now left basically with two issues which are called for decision. The first issue is that whether Smt. Malka Bahadur died leaving behind a registered Will dated 5.5.1999, and the second

issue is as to whether the suit filed was barred under the erstwhile Section 23 of the Hindu Succession Act which has now been repealed because when the suit was filed in the year 1999, Section 23 of the Hindu Succession Act was existing and this Section 23 of the Hindu Succession Act was removed from the Statute Book in terms of the Amending Act 39 of 2005 with effect from 9.9.2005 and the issue is as to whether Section 23 of the Hindu Succession Act as originally existed would continue to act as a bar for a woman to seek partition of the Hindu Undivided Family.

5. The evidence which is led by the parties to the suit has been referred to in paras 8 and 9 of the impugned judgment and these paras read as under:-

PLAINTIFF'S EVIDENCE

“8. In order to prove her case plaintiff examined as many as six witnesses:-

PW-1 is Ms. Rajika Narain who tendered her evidence by way of affidavit Ex.PW-1/A. In her evidence PW-1 has also relied Will of late Ms. Malka Bahadur as Ex.PW1/1. The declaration of HUF by late Sh. R.S.Bahadur is Ex.PW1/2. Copy of lease deed dated 01.02.1998 with Hotel Oberoi Maidens is Ex.PW1/3. Copy of Death Certificate of late Ms. Malka Bahadur is Ex.PW1/4. The Copy of Will dated 28.04.2004 executed by late Ms. Abha Narain thereby bequeathing her entire share in favour of plaintiffs is Ex.PW1/5.

(ii) PW-2 is Ms. Rasika Narain who tendered her evidence by way of affidavit Ex.PW1/A. PW-2 has also relied the documents already Ex.PW1/1 to PW1/5 in her evidence.

(iii) PW-3 is Sh. Harbans Bahadur who tendered his evidence by way of affidavit Ex.PW3/A has corroborated the fact of bequeathing the entire

share in the suit property by late Ms. Malka Bahadur in favour of late Ms. Abha Narain through Will and also the fact of appropriating the entire rental income by defendants.

(iv) PW-4 is Ms. Saroj Govind Mathur who tendered her evidence by way of affidavit Ex.PW-4/A. PW-4 has also corroborated the testimony of PW-1 and 2.

(v) PW-5 is Ms. Ashi Dayal who tendered her evidence by way of affidavit Ex.PW5/A. PW-5 is the attesting witness of the Will dated 28.04.2004, Ex.PW1/5 executed by late Ms. Abha Narain.

(vi) PW-6 is Sh. S.S.Biswal who has also tendered his evidence by way of affidavit Ex.PW6/A. PW-6 is one of the attesting witness to the Will dated 05.05.1999. Ex.PW1/1 executed by late Ms. Malka Bahadur.

DEFENDANT EVIDENCE

9. To prove their case Ms. Shashi Bahadur, defendant no.1 examine herself as DW-1. DW-1 has tendered her evidence by way of affidavit Ex.DW-1/A. Pertinently DW-1 has not relied any document in her evidence.”

6.(i) On the first aspect as to whether the respondents/plaintiffs have proved the registered Will dated 5.5.1999 executed by Smt. Malka Bahadur in favour of late Smt. Abha Narain. It is noted that this Will has been proved by PW-1, PW-2 and PW-6. PW-1 Smt. Rajika Narain is the daughter of late Sh. R.K. Narain and is the maternal grand-daughter of the original plaintiff Smt. Malka Bahadur. PW-2 is Smt. Rasika Narain and she is also the maternal grand-daughter of Smt. Malka Bahadur. PW-6 is Sh. S.S. Biswal is the attesting witness to the Will dated 5.5.1999. The attesting witness Sh. S.S. Biswal PW-6 has in terms of his affidavit by way of evidence proved the due execution and attestation of the Will dated 5.5.1999

inasmuch as it has been deposed by the attesting witness Sh. S.S. Biswal in his affidavit by way of evidence that the Will was executed by Smt. Malka Bahadur with her free will and signed without coercion and undue influence, and the executant Smt. Malka Bahadur signed in the presence of two witnesses and the two witnesses signed in the presence of Smt. Malka Bahadur. Sh. S.S. Biswal was cross-examined extensively, however he has stood his ground and there are no admissions which are extracted that the Will dated 5.5.1999 has not been duly executed and attested.

(ii) Learned counsel for the appellants/defendants however sought to argue that Sh. S.S. Biswal in his cross-examination on 19.1.2010 stated that he did not remember the name of the executant and therefore it should be held that the Will is not proved, however I cannot agree because it is in fact a human trait that after a long period of time from execution of the Will to the date of deposition i.e from the year 1999 to 2010, surely the name of the executant can be forgotten, but that does not take away the fact with respect to the deposition of the due execution and attestation of the Will. A witness

merely on this count should not be disbelieved in so far as entirety of his deposition is concerned.

(iii) Also, it was argued on behalf of the appellants/defendants that attesting witness Sh. S.S. Biswal deposed that he did not recognize the signatures of the second attesting witness, however once again this argument carries no merit because in India, as opposed to U.K., it is not required that the attesting witnesses sign in the presence of each other because whereas in U.K. the attesting witnesses have to sign in the presence of each other, as also the executant, however, in India the attesting witnesses have to sign in the presence of the executant but not in the presence of each other. This argument is also therefore rejected.

7. I may note that an important aspect that the date of execution of the Will is 5.5.1999, and which is also the date of filing of the suit, and therefore, once the executant was of sound mind for filing of the suit, the executant has to be taken to be of sound mind for execution of the Will dated 5.5.1999, and in my opinion the certificate dated 6.7.1999 filed by the legal heirs of Sh. R.S. Bahadur did not show that the deceased Smt. Malika Bahadur was not of sound

disposing mind inasmuch as and obviously executant being of 77 years of age, such a person will have many health complications but health complications do not necessarily lead to unsoundness of mind for the purpose of execution of Will.

8. I may note that the counsel for the appellants/defendants very feebly sought to argue that the Will dated 5.5.1999 should be disbelieved because the propounder took active participation in making of the Will but when queried as to whether this aspect has been proved it was conceded that no evidence has been led on behalf of the appellants/defendants that the propounder took active participation in making of the Will. This argument is therefore rejected.

9. In my opinion, the trial court has rightly held that the registered Will dated 5.5.1999 of Smt. Malka Bahadur has been duly executed, attested and hence proved as per paras 19 to 21 of the impugned judgment and which paras read as under:-

“19. Firstly I will take up the Will dated 05.05.1999, Ex. PW-1/1, executed by late Ms. Malka Bahadur. Ex.PW-1/1 is proved by PW-1, PW-2 and PW-6. PW-6 Sh.S.S. Biswal is one of the attesting witness to the Will. This witness has deposed that Will dated 05.05.1999 was executed by deceased Malka Bahadur by which she has bequeathed absolutely and forever her entire share of movable and immovable

property in favour of her daughter namely late Ms. Abha Narain and further deposed that two witnesses had signed in presence of deceased Malka Bahadur, who had also signed in the presence of two witnesses and thereby executed the Will Ex. PW-1/1. One of the main argument of defendant is that Ex. PW-1/1 is a forged and void document. It is further contended since deceased Malka Bahadur was suffering from Senile Degeneration which is evident from the certificate issued by Dr. Sunil Nigam was not in sound state of mind to execute the Will. PW-6 is cross examined at length by the defendant and during cross examination this witness has deposed :-

“The Will had been signed by me in the office of Sub Registrar, Delhi and I had seen the Will for the first time in the office of Sub Registrar, Delhi and I was told by the Sub Registrar to go through the said Will and sign it after reading the same. It is correct that my signature do not appear in the first and second page of Will Ex. PW-1/1 and appear only at point C at last page. I had put my signature as a witness on the Will Ex. PW-1/1 at the request of mother of Smt. Abha Narain. I cannot identify the signature at point D on the document Ex. PW-1/1. Volunteered. The said person was not known to me. The executant/mother of Smt. Abha Narain had appended her signature on the Will Ex. PW-1/1 first of all in my presence”.

Further, PW-2 Ms Rasika Narain is also cross examined at length on the aspect of Will Ex. PW-1/1. During cross examination PW-2 has also deposed as under :-

“I have seen the Will personally. I have seen the signature appended on the Will. I have not seen the signature of Malka Bahadur on legal notice. I have not seen the signature of Ms. Malka Bahadur on any document related to the present suit. At this stage, the witness is shown the document Ex. PW-1/1. The witness attention is also drawn on the signatures of Smt. Malka Bahadur, on the vakalatnama filed on her behalf in the present suit. After seeing both the signatures, witness has identified the signatures to be of Ms. Malka Bahadur and being similar in nature. During cross examination the question was put to the witness by the defendant and she replied the same which is as under:

Que. Are you aware of the mental condition/mental health of Ms. Malka Bahadur in the period May 1999 to July 1999?

Ans. She was depressed, very depressed due to the ill treatment given to her by her daughter-in-law. She had discussed this with my mother, myself and my sister Rajika Narain. She has also discussed this things with her own siblings. But she was well aware of the things happening around her.”

Further, PW-1 Rajika Narain who has proved the Will Ex. PW-1/1 in her affidavit and this witness is also cross examined by the defendants at length i.e. running into four pages. On perusal of cross examination of PW-1 it is clear that no question is put to this witness regarding the Will.

20. I have perused the testimony of all these witnesses. The argument that the Ex. PW-1/1 is forged and void document as same has not been proved as per law, is not tenable. As per mandate of Section 68 of Evidence Act PW-6 has proved the execution of Will as per law. This witness has specifically deposed that deceased Malka Bahadur put her signature in the presence of both the witnesses and both the witnesses has also put their signatures in the presence of deceased Malka Bahadur in the office of Sub Registrar Delhi. PW-6 has also deposed that deceased Malka Bahadur has signed all the pages of Will in my presence. He has also deposed that deceased Malka Bahadur was asked by Sub Registrar whether she is executing the Will with her free consent and in the absence of any influence. The witness has also deposed that he had gone through the content of the Will before signing the same as a witness. The witness has denied the suggestion that he has not seen the executent or the witness appending their signatures on the Will. It is pertinent that no question regarding the mental capacity/sane mind is put to this witness during cross examination. This court is of the view that except that this witness could not remember the name of the deceased Malka Bahadur during cross examination, his testimony is trustworthy, unimpeachable and reliable. Simply that witness is a property dealer does not make the testimony unreliable.

21. During cross examination PW-2 Ms Rasika Narain was also cross examined on the aspect of signature of the deceased Malka Bahadur which she has identified the signature put to her on the vakalatnama of the deceased. On the aspect of soundness of mind of the deceased Malka Bahadur PW-2 has categorically deposed that deceased was well aware of the things happening around her. She has also deposed that deceased was depressed due to the ill treatment given by her daughter-in-law. Further the argument of defendant that Dr. Sunil Nigam is not deliberately examine by plaintiff on the pretext that he may depose against them is not sustainable. It is the case of defendant that she was looking after late Ms. Malka Bahadur who was getting treatment from said doctor. I failed to understand why defendant did not call Dr. Sunil Nigam as their own witness. There is no bar to call the said witness to prove the document issued by him. Simply because a person is suffering from Senile Degeneration does not mean that at the time of executing the Will she was not in sound mind. In view of these reasons, this court is of view that plaintiff has succeeded in proving the Will as per law and I hold that Will dated 05.05.1999 executed by late Ms. Malka Bahadur in favour of Ms. Abha Narain is genuine, authentic and validly executed and proved as per law.” (emphasis added)

10. On the aspect as to whether the suit was barred because of Section 23 of the Hindu Succession Act as it stood before 9.9.2005,

trial court has rightly held that removing of Section 23 of the Hindu Succession Act from the Statute Book has only removed any bar with respect to filing of the suit for partition and in this regard the trial court has relied upon various judgments of the Supreme Court and this Court. In any case, no issue can at all arise with respect to any alleged vested rights created by Section 23 of the Hindu Succession Act read with Section 6 of the General Clauses Act inasmuch as obliterating of a Section which only contained a bar is with respect to a procedure for enforcement of a right and not with respect to the substantive right itself. Accordingly, the trial court in my opinion rightly by observing as under has rejected the argument that the suit was barred on account of Section 23 of the Hindu Succession Act:-

14. Consequent upon repealing of Section 23 of the Act by the 2005 Amendment Act, first I will discuss the effect of repealing on the cases instituted prior to amendment.

(a) The effect of deletion of a provision from a statute has been examined by Constitution Bench of Hon'ble Supreme Court in "Kolhapur Canesugar Works Ltd. Vs. Union of India, AIR 2008 SC 811, where it has been held that the effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this rule, an exception is engrafted by the provisions of Section 6(1). If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards.

(b) Relying upon the aforesaid decision, the Hon'ble Madhya Pradesh High Court in Prabhudayal Vs. Ramsiya, 2009 (2) MPLJ 247, has categorically held that in the absence of any saving clause in the

Amendment Act of 2005, the omitted Section 23 is not saved for pending cases and will not longer be applicable.

(c) The same view has been taken by the Hon'ble High Court of Delhi in Krishan Sharma Vs. Raj Rani, AIR 2013 Del. 136, and Vineeta Sharma Vs. Rakesh Sharma, 2013 (139) DRJ 244. As also by the Hon'ble Calcutta High Court in Kalipada Kirtan Vs. Bijoy Bag & Ors., AIR 2008 Cal. 63.

(d) Further Hon'ble Supreme Court in G.Sekar V. Geetha & Ors. 2009 (6) SCC 99, has held that "we may in the aforementioned backdrop notice the relevant portion of the Statement of Objects and Reasons of the 2005 act, which reads as under: 'It is proposed to remove the discrimination as contained in Section 6 of the Hindu Succession Act, 1956 by giving equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have. Section 23 of the Act disentitles a female heir to ask for partition in respect of a dwelling house wholly occupied by a joint family until the male heirs choose to divide their respective shares therein. It is also proposed to omit the same section so as to remove the disability on female heirs contained in that section.'"

It is, therefore, evident that the Parliament intended to achieve the goal of removal of discrimination not only as contained in Section 6 of the Act but also conferring an absolute right in a female heir to ask for a partition in a dwelling house wholly occupied by a joint family as provided for in terms of Section 23 of the Act.

15. Therefore, following the above law as declared by superior Courts in the G. Sekar Case, Kolhapur Canesugar case, Prabhudayal case as well as Krishna Sharma Case (supra), I am of the view that the plaintiff should not be denied of the advantage conferred upon her by the 2005 Amendment Act. Hence, the bar created under Section 23 of the Act is no longer available to the male heirs to oppose partition as in the amending Act even the pending proceedings for partition have not been saved. This issue is accordingly decided in favour of the plaintiff and against the defendants."

11. In view of the above, I do not find any merit in the appeal. Dismissed.

JANUARY 24, 2018/ib

VALMIKI J. MEHTA, J