

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

% **Date of decision: 23rd April, 2020.**

+ **CS(OS) 191/2016 & IAs No.5040/2016 (u/O XXXIX R-1&2 CPC), 12979/2016 (u/S 151 CPC) & 3048/2018 (u/O VIII R-1A CPC)**

KAMAL PARTI

..... Plaintiff

Through: Mr. Vishesh Issar, Adv.

Versus

SMT. RAJ KUMAR PARTI & ANR

..... Defendants

Through: Ms. Neelima Tripathi and Mr. Gunjan Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff Kamal Parti has instituted this suit, for declaration and permanent and mandatory injunctions against his mother Smt. Raj Kumar Parti and his brother Deepak Parti, pleading that (i) Om Parkash Parti, being the father of the plaintiff and defendant no.2 and husband of defendant no.1, was allotted by the Delhi Development Authority (DDA) a plot of land *ad-measuring* 200.13 sq. yds. bearing No.B-2/84, Safdarjung Enclave, New Delhi and constructed a two and a half storey house thereon; the leasehold rights in the land underneath the property (subject property) were also got converted into freehold by the said Om Parkash Parti in his name; (ii) the said Om Parkash Parti died on 23rd July, 2008 leaving besides his wife defendant no.1, the plaintiff, defendant no.2 and Arun Parti as his sons; (iii) Om Parkash Parti left a registered Will dated 13th April, 2002

whereunder he has bequeathed absolute rights in various other properties and lifetime rights in the subject property to his wife defendant no.1, with the condition that the defendant no.1 cannot transfer any right in the subject property without the written consent from her three sons namely plaintiff, defendant no.2 and Arun Parti; (iv) the defendant no.1, without obtaining prior written consent of the plaintiff and Arun Parti, has transferred the second floor portion with roof rights of the subject property, to defendant no.2, by way of Gift Deed dated 12th November, 2015 affecting the rights of the plaintiff in the property; and, (v) the defendant no.2 is intending to transfer the rights in his favour to outsiders. The plaintiff thus seeks (a) declaration as null and void of the Gift Deed dated 12th November, 2015; (b) permanent injunction restraining the defendants from creating any third party rights in the property or any part thereof and/or from interfering in the plaintiff's use and occupation of the property; and, (c) mandatory injunction directing the defendants to allow the plaintiff use of indivisible rights in the property.

2. The suit came up first before this Court on 26th April, 2016 when the counsel for the defendants being on caveat appeared and summons of the suit and notice of the application for interim relief were issued and the defendants restrained from selling or encumbering the property till further orders; the defendant no.1 was however permitted to let out the property and receive rents thereof.

3. The defendants have filed a joint written statement pleading that, (i) under the Will dated 13th April, 2002, the property has been bequeathed solely in favour of the defendant no.1; (ii) the Will places limited condition

upon the defendant no.1, of not selling the property except with the consent of the plaintiff, defendant no.2 and Arun Parti; (iii) the said Will has been accepted and duly acted upon by all the family members of late Om Parkash Parti; (iv) at the time of construction of the property by Om Parkash Parti, he with his family was residing in another property; (v) only in the year 1984, Om Parkash Parti along with the defendants started residing on the first floor and subsequently in the year 1990 also occupied the second floor of the property; (vi) the plaintiff has never lived in the property; (vii) the defendant no.2 shifted to USA in the year 2003 and the second floor was again let out by Om Parkash Parti who continued to reside with the defendant no.1 on the first floor of the property; (viii) the rental income derived from the property was to provide living and maintenance of the defendant no.1; (ix) the defendant no.1, after the death of Om Parkash Parti, has been letting out the property to tenants from time to time and the property was her only source of maintenance; (x) even if the property were to be sold by the defendant no.1 after obtaining written consent of her three sons, the entire sale consideration was to belong to the defendant no.1 only; (xi) under the Transfer of Property Act, 1882, sale is distinct from a gift; (xii) the defendant no.1 is the sole owner of the property after the demise of Om Parkash Parti and is thus fully entitled to execute gift thereof or of any portion thereof; (xiii) the condition of not selling the property without the consent of the sons does not in any way take away the ownership rights of the property; (xiv) the defendant no.1 is also the absolute owner of the property under Section 14 of the Hindu Succession Act, 1956; and, (xv) the defendant no.1, out of her natural love and affection for defendant no.2, has

executed the gift deed in favour of defendant no.2 and the suit is misconceived.

4. Though the plaintiff has filed a replication but need to refer thereto is not felt.

5. Before proceeding further, it is deemed apposite to reproduce *in toto* the undisputed Will of Om Parkash Parti. The same is as under:-

I, Om Parkash Parti, S/o Late Shri Khidmat Rai Parti, R/o B-2/84, Safdarjang Enclave, New Delhi, do hereby execute my WILL on this 13th day of April 2002 at New Delhi – 110029.

I Om Parkash Parti in my full senses and disposing mind fully understand what is right and what is wrong. I of my own free will, without any pressure force, coercion, compulsion and/or influence of any kind from any quarter, pass on, give and bequeath all my movable and immovable assets of all kinds to my legally wedded wife Smt. Raj Kumari Parti D/o Late Shri Rala Ram Gaiind and Late Smt. Lajwanti Gaiind, R/o 38 Hanuman Road, New Delhi-110001.

WHEREAS I am blessed with four sons Kamal Parti, Arun Parti, Deepak Parti and Sanjeev Parti. My youngest son Sanjeev Parti was legally adopted in his infancy by me wife's sister Smt. Viran Mehta and her husband Shri Bal Kishan Mehta S/o Late Shri Ferozi Lal Mehta, R/o C-12 Nizammudin (East), New Delhi and rechristened from Sanjeev Parti to Sanjeev Mehta and declare that no part of my assets movable or immovable whatever shall devolve upon him.

All my self acquired assets such as two and half storeyed house built on plot No.84 in Block B-2, Safdarjang Enclave, New Delhi, my ½ (half)

share in the commercial flat of 525 Sq. ft. booked in the Skipper's, Jhandewalan Tower, New Delhi, its interest, compensation etc. and other assets such as FDRs in the Banks and all the cash balances lying to my credit in the various banks namely Standard Chartered Bank, 17 Parliament Street, New Delhi-I. Standard Chartered and Grindlays 'E' Block, Connaught Place, New Delhi, Bank of India, Indira Place, Connaught Circus, New Delhi, Hong Kong & Shanghai Banking Corporation, E.C. House, Kasturba Gandhi Marg, Indian Overseas Bank, B-2 Market, Safdarjang Enclave, New Delhi etc. whether Jointly or singly, title and proceeds of all shares, Hundies, Debentures, Investment in UTI in various UTI Schemes and also income from any other investment elsewhere, all liquid cash, in short all above assets and any other assets that belongs to me will go to my wife Smt. Raj Kumari Parti.

My wife Smt. Raj Kumari Patri during her life time can enjoy all the assets bequeathed by me in any manner she desires excepting the property B2/84, Safdarjung Enclave, New Delhi, which she can only sell with the written consent of my three sons Kamal Parti, Arun Parti and Deepak Parti.

My share in the ancestral moveable and immovable property and agricultural land in our village Sham Chaurasi District Hoshiarpur, Khurampur and Birmiani in District Phagwara and Village Bhatte in Tehsil Kartarpur District Jalandhar and Pucca 1-1/2 Storeyed house in Mohalla Partian in Sham Chaurasi, Distt. Hoshiarpur, is also bequeathed in favour of my wife Mrs. Raj Kumari Parti.

In case, however my wife predeceases me then after my death the entire assets will be equally

shared by my three sons Kamal Parti, Arun Parti and Deepak Parti.

This is my last WILL and testament which hereby supersedes any wills or codicils that I may have made in the past and as such stand revoked.”

(emphasis added)

6. The suit, ripe for framing of issues, came up before the undersigned on 24th January, 2018 when, on the counsels informing that the Will of Om Parkash Parti was not in dispute, it was enquired from the counsels, what purpose recording of evidence in the suit will serve inasmuch as the only question for adjudication was the interpretation of the Will and the applicability of Section 14(1) of the Hindu Succession Act. It was also observed that the other factual disputes raised in the pleadings were not germane to adjudication of the controversy in issue. The suit was accordingly adjourned for hearing the counsels on the said aspect and to obviate any further adjournment, the counsels were asked to address on:-

- “(I) the Will having not provided as to whom the property, after the lifetime of the defendant No.1 will go, and having made a provision only for the eventuality of defendant No.1 pre-deceasing the testator, whether the interest bequeathed to the defendant No.1 qualifies as a life interest;*
- (II) qua my judgment in **Mahima Vs. DDA** 2014 SCC OnLine Del 3661 and against which an appeal was learnt to have been preferred;*
- (III) Whether Section 14(1) of the Act applies to Wills executed after the enactment of the Hindu Succession Act, 1956;*

(IV) *Whether the property aforesaid is also covered by the clause immediately preceding the latter of the clauses hereinabove reproduced in the Will and if so, to what effect.*”

7. It is also deemed appropriate to reproduce herein below the statutory provisions with respect to which queries were raised on 24th January, 2018.

Section 14 of the Hindu Succession Act is 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.*”

8. The counsels were heard on 4th May, 2018, 22nd October, 2018 and 29th March, 2019 and orders reserved.

9. The counsel for the plaintiff, on 4th May, 2018 having contended that ***Mahima*** supra supports the plaintiff and the counsel for the defendants also agreeing therewith but with some reservation, the counsel for the defendants was asked to commence arguments.

10. The counsel for the defendants argued that:

- (i) the condition imposed in the Will aforesaid, of the defendant no.1 obtaining the consent of the sons, is only qua sale and not qua gift;
- (ii) the Will does not bequeath the property ultimately to the plaintiff and does not say that after the defendant no.1, the property will be inherited by the plaintiff, defendant no.2 and Arun Parti, being the three sons of Om Parkash Parti; thus, Section 14 of the Hindu Succession Act is not attracted;
- (iii) there can be no enlargement of the restriction placed in the Will on the rights of the defendant no.1 to the property bequeathed;
- (iv) reliance was placed on ***K.S. Palanisami Vs. Hindu Community in General and Citizens of Gobichettipalayam*** (2017) 13 SCC 15 laying down:-
 - (a) that the cardinal maxim to be observed in construing a Will is, to endeavour to ascertain the intention of the testator and this intention has to be gathered primarily from the language of the document which is to be read as a whole, without indulging in any conjecture or

speculation as to what the testator would have done if he had been better informed or better advised;

- (b) that the Court is not entitled to ignore clear words or add something of its own or dilute the meaning of any clear word used in the Will; in the absence of any words indicating intention to give life estate, the intention was to give absolute rights in the property; and,
- (c) that the fact that the words “without right of alienation” were used in one part of the Will and not in the other part was of relevance;
- (v) reliance was placed on *Brahma Vart Sanatan Dharm Mahamandal Vs. Kanhaiya Lal Bagla* (2001) 9 SCC 562 where, from use of the words “will vest absolutely in my wife” it was held that absolute ownership was bequeathed and it was further held that merely because it was also provided in the Will that the widow may adopt a son would not make the absolute bequest a bequest for lifetime;
- (vi) reliance was placed on *Sonia Bhatia Vs. State of U.P.* (1981) 2 SCC 585, holding that the concept of a gift is diametrically opposed to the presence of any consideration or compensation and the motive or the purpose of making a gift should not be confused with the subject matter of a gift;
- (vii) reliance was placed on *Shakuntala Vs. State of Haryana* (1979) 3 SCC 226 to contend that while the word ‘transfer’ covers both sale and gift, the word ‘sale’ does not cover gift;

- (viii) reliance was placed on *Gopala Menon Vs. Sivaraman Nair* (1981) 3 SCC 586, negating the argument that though absolute estate had been bequeathed but the widow was not entitled to dispose of the property by a Will by holding that absolute and unrestricted power to dispose of property is a necessary incident of an absolute estate and if an absolute grant is burdened with a restraint on alienation, the grant is good and the condition void;
- (ix) as per the aforesaid Will, only in the event of defendant no.1 predeceasing Om Parkash Parti, was the property to go to the sons but not otherwise; and,
- (x) the restriction on the power of the defendant no.1, as absolute owner, of sale, does not dilute the ownership of the defendant no.1 and the restriction cannot be enlarged.

11. I had during the hearing enquired from the counsel for the defendants, whether not the restriction on sale, shows the intent of Om Parkash Parti that the property should not go out of the family.

12. The counsel for the defendants though not agreeing therewith contended that even if it be so, by execution of a gift in favour of the defendant no.2, the property has not gone out of the family.

13. Though it was the contention of the counsel for the defendants that Section 14 of the Hindu Succession Act has no applicability to the present controversy but on enquiry, drew attention to the replication of the plaintiff where the plaintiff has pleaded that the rental income from the ground and second floor of the property at the time of death of Om Parkash Parti was

Rs.51,000/- per month and the said rental income was to provide for the living and maintenance of the defendant no.1.

14. With respect to ***Mahima*** supra, it was contended by the counsel for the defendants that therein, there was a break down of matrimonial relation between the deceased and his widow and it is for this reason that ***V. Tulasamma Vs. Sesha Reddy*** (1977) 3 SCC 99, wherein the matrimonial relationship had continued, was held to be not applicable. It was further informed that ***Sadhu Singh Vs. Gurdwara Sahib Narike*** (2006) 8 SCC 75 relies on ***Karmi Vs. Amru*** (1972) 4 SCC 86 but which in ***Shakuntala Devi Vs. Kamla*** (2005) 5 SCC 390 has been held to be not good law. It was further contended that in ***Thota Sesharathamma Vs. Thota Manikyamma*** (1991) 4 SCC 312 also, ***Karmi*** supra has been held to be *per incuriam*. It is yet further informed that ***Sadhu Singh*** supra does not notice ***Thota Sesharathamma*** supra. In the context of Section 14 only, it was also contended that ***Jupudy Pardha Sarathy Vs. Pentapati Rama Krishna*** (2016) 2 SCC 56 as well as judgment of the Division Bench of this Court in ***Vipin Kumar Jain Vs. Ram Babu Jain*** 2017 SCC OnLine Del 9667 support the defendants. It was also added that ***Ranvir Dewan Vs. Rashmi Khanna*** 2018 (12) SCC 1, in the compilation of judgments of the counsel for the plaintiff, is also not applicable because in that case finally bequest was made in favour of the children.

15. The counsel for the plaintiff, per contra has argued that, (i) the Will makes a distinction between two sets of properties; while one set of properties has been bequeathed absolutely to the defendant no.1, without any restrain, with respect to the second set i.e. to the subject property,

restriction has been placed on the right of the defendant no.1 to sell; (ii) all the judgments are with respect to only one property in which the restricted estate was given; however in the present case the Will clearly makes out a distinction between two sets of properties; (iii) attention was invited to Section 139 of the Indian Succession Act, 1925 providing that “where a testator absolutely bequeaths a fund, so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit for the legatee; if that benefit cannot be obtained for the legatee, the fund belongs to him as if the will had contained no such direction” and it was contended that here there is no legatee; (iv) the present case is covered by Section 14(2) of the Hindu Succession Act, since the property has not been given in lieu of maintenance and only where the property has been given in lieu of maintenance, will Section 14(1) of the Act apply; (v) in ***Brahma Vart Sanatan Dharm Mahamandal*** supra and ***Gopala Menon*** supra, the bequest was absolute; here there is no absolute bequest; (vi) the rule of interpretation of Wills, is that effect has to be given to every statement and word; (vii) the use of the word ‘excepting’ in the Will shows intent of Om Parkash Parti that the property is for the benefit of his three sons, as is also provided in the event of the defendant no.1 predeceasing her husband; (viii) attention was invited to ***Sharad Subramanyan Vs. Soumi Mazumdar*** (2006) 8 SCC 91 followed in ***G. Rama Vs. T.G. Seshagiri Rao*** (2008) 12 SCC 392 to contend that in the absence of any indication, either in the Will or externally, to indicate that the property had been given to the female Hindu in recognition of or in lieu of her right to maintenance, the situation falls within the ambit of Section 14(2) of the Act and the restricted life

estate granted to the female Hindu could not be enlarged into an absolute estate; and, (ix) on the aspect of statutory interpretation of the Will, reliance was placed on *Sadaram Suryanarayana Vs. Kalla Surya Kantham* (2010) 13 SCC 147, referring to Sections 84 to 87 of the Indian Succession Act, *Narendra Gopal Vidyarthi Vs. Rajat Vidyarthi* (2009) 3 SCC 287 and *Uma Devi Nambiar Vs. T.C. Sidhan* (2004) 2 SCC 321, reiterating the armchair principle.

16. I have considered the rival contentions.

17. I will first take up the aspect of interpretation of the Will, *de hors* Section 14 of the Hindu Succession Act.

18. A reading of the Will shows that the deceased Om Parkash Parti, under the first operative clause of the Will, bequeathed his entire self acquired assets comprising of movable and immovable properties to the defendant no.1. However the deceased Om Parkash Parti, in the subsequent paragraph, while providing that the defendant no.1 in her lifetime can enjoy all assets bequeathed by him in any manner she desired, carved out an exception with respect to the subject property to the effect that the defendant no.1 can sell the property only with the consent of her three sons mentioned therein. In the third operative paragraph of the Will, the deceased Om Parkash Parti bequeathed his share in the ancestral movable and immovable properties also to the defendant no.1. In the last operative paragraph of the Will, the deceased Om Parkash Parti provided for the eventuality of the defendant no.1 predeceasing him and in which case he bequeathed his entire estate equally to his three named sons.

19. It is quite evident that the estate bequeathed to the defendant no.1 in the subject property was treated differently by the deceased from the estate being bequeathed by him to defendant no.1 in the remaining properties. However, the only restriction placed is with respect to sale and as per the Will the same could be only with the written consent of the three sons.

20. The reason why such a distinction was made is not hard to decipher. The 'other estate' of the deceased comprised of (i) half share in a commercial flat booked with the builder and whose possession had not been delivered; (ii) monies in banks; (iii) investments in shares, debentures etc; and, (iv) share in ancestral properties. On the contrary, the deceased, in the Will has described himself as a resident of the subject property and has described the said property as his residence. Thus, while the 'other estate' of the deceased comprised of movable assets (even though the ancestral properties included immovable properties but the deceased was only having a share i.e. money equivalent therein), the subject property was the only immovable/fixed asset of the deceased. The deceased, under his Will bequeathed to defendant No.1, right of enjoyment of movable assets, in any manner she desired, but not so with respect to the only immovable/fixed asset. The deceased did not want his wife to sell the subject property without the written consent of his three sons, as is evident/clear from use of the words "which she can only sell...". It is further clear therefrom, that the deceased Om Parkash Parti did not desire to empower his wife, the defendant No.1 herein, to, "...during her lifetime..." deal with his only immovable property bequeathed to her "...in any manner she desires..." (as she had been empowered with respect to movable assets bequeathed to her), resulting in the said only immovable asset/residence being no longer

available for his sons i.e. plaintiff, defendant No.2 and Arun Parti. This intention is also fortified from the bequeath in their joint favour, of the entire estate in the event of defendant No.1 predeceasing the deceased Om Parkash Parti.

21. Applying the armchair principle, the reason why such a restriction on enjoyment of the subject property only by his wife, would be incorporated by the deceased in the Will is, that the deceased did not want his only fixed asset dissipated without the consent of all his natural heirs who, in the absence of the Will, would inherit a share in the said fixed asset.

22. Seen in this light, the deceased Om Parkash Parti has not made any distinction between his three sons, neither in bequeathing the property equally to them in the event of the defendant no.1 predeceasing him nor in the matter of consent to sale of subject property, nor mentioned any reasons for the three sons i.e. the plaintiff, defendant no.2 and Arun Parti, to be treated differently. The plea/argument, that while the plaintiff has never resided in the house, the defendant No.2 has been residing, is thus of no avail.

23. Undoubtedly, a gift is different from sale and sale does not include a gift. No judgment is required for the said conclusion. However, what is being interpreted here is a 'Will', after the author thereof is no more available. The task has been held to be a solemn one, since it involves giving effect to the want/wish of a dead person i.e. an obligation of the living to the dead. Such interpretation cannot be the same as of a commercial contract/agreement.

24. The intent of the deceased Om Parkash Parti, of the subject property being sold by the defendant no.1 with the written consent of his three sons, in my interpretation thereof, cannot be permitted to be defeated by applying the technicalities of law, of a gift being different from a sale and the requirement of consent being only for sale and not qua gift or transfer by any other mode.

25. The counsel for the defendants has also been unable to give any reason for the restriction on sale and which would not apply in the case of a gift, even if to one of the three sons, amounting to unequal instead of equal treatment of the three sons which the deceased intended.

26. The only purpose in providing for the sale by the defendant no.1 to be with the written consent of the three sons, as aforesaid, could be, the special place which a residential house enjoys in one's belongings, with a sense of permanence and 'for generations' attached thereto and the desire of the deceased of the same being divested with knowledge of all who would have a share therein but for the Will. This restriction on sale, read with bequeath to all three sons equally in the event of defendant no.1 predeceasing the testator, discloses the intention of the testator that the said residential house, unless sold by consent of all, after the lifetime of defendant no.1, being inherited equally by plaintiff, defendant no.2 and Arun Parti.

27. In this context, it is also worth mentioning that the Will, though registered, does not bear signatures of any advocate, neither as draftsman thereof or as witness thereto. Generally, it is the advocate practicing at the Sub-Registrar's Office who drafts the Will and/or is an attesting witness to

the Will. Both attesting witnesses to the subject Will, are neighbours of the deceased. The Will appears to have been drafted by the deceased himself. The language of the Will also, is not such as is generally used by advocates. This also, in my view, is relevant in the matter of interpretation of a Will.

28. Supreme Court, in *Uma Devi Nambiar* supra summed up the law relating to interpretation of a Will as, that the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense, are all to be considered, as an aid to ascertain the meaning of its language. It was held, that the intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the Will as a whole with all its provisions and ignoring none of them as redundant or contradictory.

29. The Indian Succession Act, 1925, consolidating the law applicable to intestate and testamentary succession also, under Part VI titled 'Testamentary Succession', in Chapter VI titled 'Of the Construction of Wills', vide (a) Section 74 prescribes that it is not necessary that any technical words or terms of art be used in a Will, but the wording should be such that the intentions of the testator can be known therefrom; (b) Section 82 prescribes that the meaning of any clause in a Will is to be collected from entire instrument, and all its parts are to be construed with reference to each other; (c) Section 83 permits words to be understood in a wider sense than that which they usually bear, where it may be collected from other words of the Will which the testator meant to use them in such wider

sense; (d) Section 87 requires the testator's intention to be effectuated as far as possible; (e) Section 88 lays down that where two clauses of gifts in a Will are irreconcilable, the last shall prevail; and, (f) Section 122 provides that where a bequest imposes an obligation on a legatee, he can take nothing by it unless he accepts it fully. My interpretation hereinabove, with respect to interpretation of the word 'Sale' and of the intention of the deceased Om Parkash Parti, is also in terms of said statutory provisions. The defendant No.1, once has accepted the Will, is bound by the condition/obligation therein, of not disposing off the subject property without consent of her three sons and which admittedly was not taken before executing the Gift Deed. I may also highlight, that in the Will of deceased Om Parkash Parti, there is no provision mandating the defendant No.1 to let out the subject property or any part thereof and to maintain herself from the rent realised. The fact that defendant No.1, after demise of her husband so let out the property, is irrelevant. Thus, the whole argument, of the subject property being for maintenance, is misconceived. The argument, that the sale proceeds also were to be of defendant No.1 only, is equally misconceived. Once the defendant No.1 could not sell without written consent of her sons, it was open to the sons including the plaintiff, to, even if so consenting, impose condition, including of share in the sale proceeds.

30. On such interpretation, the defendant no.1 was/is not entitled to deal with the property, whether by way of sale or gift or in any other manner totally divesting herself of the property, without the consent of the plaintiff, defendant No.2 and Arun Parti and any such dealing would be void.

31. From the Will, not making any provision with respect to the subject property (which the defendant no.1 could not sell, save with the consent of all her three sons) after the lifetime of the defendant no.1, as is normally found in the Wills bequeathing a restricted estate, also it follows that the deceased Om Parkash Parti did not envisage his wife defendant no.1 discriminating between the three sons in any manner whatsoever including in the matter of making a Will. The deceased Om Parkash Parti proceeded on the premise, that if the subject property was not sold by the defendant no.1 with the consent of all his three sons, the same, after the lifetime of defendant no.1, would be inherited by his three sons, just like it would have been had the defendant no.1 predeceased him. The prohibition in the Will, on disposition of the property by the defendant no.1 save with the consent of his three sons, was with the intent of property, if not so sold, ultimately after the lifetime of defendant no.1, belonging to the three sons.

32. Thus, on an interpretation of the undisputed Will, I find in favour of the plaintiff and against the defendants.

33. Though the hearing was commenced, besides on the aspect of interpretation, also qua Section 14 of the Hindu Succession Act, but the counsel for the defendants having categorically stated that according to the defendants, Section 14 has no application, it follows that the defendant no.1 is not claiming the unrestricted estate in the subject property under Sub-section (1) of Section 14.

34. Mulla's treaties on Hindu Law, 23rd (2018) Edition sums up the position with respect to Section 14, as (a) a most expansive interpretation to the general rule enacted in sub-section (1) has been given; (b) sub-section

(2) must be read only as a proviso or exception to sub-section (1) and its operation must be confined to cases where property is acquired for the first time as a grant, without any pre-existing right, under a Will, the terms of which prescribe a restricted estate in the property; (c) where the property is acquired by a female Hindu in lieu of maintenance, it is in lieu of a pre-existing right and such an acquisition would not be within the scope and ambit of sub-section (2), even if the Will prescribes a restricted estate in the property; (d) it depends on the facts of each case, whether the same is covered by the first or the second sub-section; and, (e) sub-section (2) can come into operation only if acquisition of the property is made without there being a pre-existing right to the female Hindu who is in possession of the property.

35. Thus, for the defendant no.1 to claim that notwithstanding the restricted estate bequeathed to her under the Will of her husband, she is the absolute owner of the property, it was incumbent on the defendant no.1 to plea that the subject property was bequeathed to her in lieu of a pre-existing right. Without the defendant no.1 pleading so, she cannot claim absolute right to the property under Section 14(1).

36. The defendant no.1 herein having contended that Section 14 has no application, it is obvious that it is not the case of the defendant no.1 that the subject property has been bequeathed to her in lieu of any pre-existing right. Not only has it not been so contended, in the joint written statement of the defendant no.1 and defendant no.2 also, there is no such plea. All that has been pleaded in paragraph 5 of the preliminary objections is that the rental income derived from the subject property was to provide for

living and maintenance of defendant no.1 and that the defendant no.1 has been letting out the property to tenants from time to time and deriving income for her living and maintenance. No pre-existing right to maintenance, and which a must for Section 14(1) to apply, has been pleaded.

37. A pre-existing right is not a question of law alone but is a question of fact. For the defendant no.1 to, notwithstanding having been bequeathed a restricted estate, become an absolute owner under Section 14(1), it would be incumbent upon her to plead that she was dependent upon her husband i.e. the deceased Om Parkash Parti for maintenance and had no other source of income or maintenance. The deceased Om Parkash Parti, in the Will has described his 'other estate' as comprising of half share in the commercial flat/its interest/compensation and the monies lying in bank accounts either jointly held by him or singly held by him and other investments, in all of which unrestricted right has been bequeathed to the defendant no.1. The defendants themselves have produced before this Court the Health Care Reform Compliance Plan, North Carolina in the name of defendant no.1. It is also the plea of the plaintiff in the replication that the defendant no.1 is a Green Card holder of USA and resides there and in fact has been asking the plaintiff to manage her affairs in India. The plaintiff has also produced before this Court, documents showing the monies held by the defendant no.1 in her bank accounts to be in excess of Rs.45 lacs and in the face of all the documents on record, it was incumbent on the plaintiff to plead a pre-existing right in lieu of which the Will bequeathing restricted estate in the subject property was executed. This coupled with the contention of inapplicability of Section 14 leads to only

inference that though lip service is paid to Section 14 in the written statement, but no pre-existing right is claimed. Supreme Court, recently in ***Ajit Kaur Alias Surjit Kaur Vs. Darshan Singh*** (2019) 13 SCC 70, finding the widow in that case, to be though in possession but without any ‘pre-existing right’ to the property, reiterated that she could not claim full ownership under Section 14(1) of the Hindu Succession Act.

38. Even otherwise, I have in ***Mahima*** supra noticed the dichotomy of views in dicta of the benches of equal strength in ***Sadhu Singh*** supra on the one hand and ***Jagannathan Pillai Vs. Kunjithapadam Pillai*** (1987) 2 SCC 572 and ***Gulwant Kaur Vs. Mohinder Singh*** (1987) 3 SCC 674 on the other hand and opted to follow ***Sadhu Singh*** supra, holding that:

A. ***Sadhu Singh***, after analysing and interpreting the language of Section 14(1) as well as the changes in Hindu Law upon the coming into force of the Hindu Adoptions and Maintenance Act, 1956 holds Section 14(1) to be applicable only where the Hindu female is in possession of the property on the date of commencement of the Hindu Succession Act and not where the Hindu female comes into possession of the property after the commencement of the said Act. Per contra, ***Jagannathan Pillai*** on which the subsequent judgments in ***Gulwant Kaur***, ***Nazar Singh*** and ***Santhosh*** (supra) taking a different view are based, was a case where the widow though acquired a limited estate from her husband was not in possession on the date of coming into force of the Hindu Succession Act and repossessed the property thereafter. It was in this context that the Supreme Court held Section 14(1) to be applicable holding that the

word “possessed” has to be given a wide meaning. This peculiar fact of the widow in *Jagannathan Pillai* having acquired the property prior to the commencement of the Hindu Succession Act was not noticed in the subsequent judgments supra holding that possession of the property under Section 14(1) could be before or after the commencement of the Act. In none of the said judgments the provisions of the Hindu Adoptions and Maintenance Act and the changes brought about thereby in the right of Hindu female to maintenance were also noticed.

B. Section 14(1) carves out a difference between possession of the property and acquisition of the property. Only the word "acquired" is qualified with the words “whether before or after the commencement of this Act”. Had the intention of the legislature been that a property acquired by a female Hindu, whether before or after the commencement of the Act, shall be held by her as full owner and not as a limited owner, there was no need to carve out a distinction between possession and acquisition of the property. From such distinction made out and from the intentional omission to qualify the word "possessed" with the words "whether before or after the commencement of this Act" the legislative intent of, for applicability of Section 14(1), possession on the date of commencement of the Act being essential is quite explicit.

C. All statutes particularly those governing and regulating human relations are dynamic in nature and their interpretation, inspite of societal changes, cannot remain static. Law cannot be a fossil. The

Supreme Court in *Union of India v. Raghubir Singh* (1989) 2 SCC 754 emphasized the need for adapting the law to new urges in society and quoted with approval the Holmesian aphorism that the "life of the law has not been logic, it has been experience". It was further held that in a developing society such as India, law does not assume its true function when it follows a groove chased amidst a context which has long since crumbled. Similarly in *State of Punjab v. Devans Modern Breweries Ltd.* (2004) 11 SCC 26 it was held that a decision although neither reversed nor overruled may cease to be law owing to changed conditions and changed law, as reflected by the principle "cessante ratione legis cessat ipsa lex". In *Bhuwalka Steel Industries Ltd. v. Bombay Iron and Steel Labour Board* (2010) 2 SCC 273 it was reiterated that the trend of judicial opinion is that stare decisis is not a dogmatic rule allergic to logic and reason; it is a flexible principle of law operating in the province of precedents providing room to collaborate with the demands of changing times dictated by social needs, State policy and judicial conscience. *V. Tulasamma* is a judgment of a different era, the guiding principle whereof was the Shastric Hindu Law and to convert, the limited ownership rights of women who till then were clearly discriminated against insofar as ownership of property was concerned, to absolute right. However with the changing times and changing relationships particularly between husband and wife it is felt that to adopt the interpretation of Section 14(1) as in *V. Tulasamma* would be to the detriment of wives. If such an interpretation were to be followed in today's times, husbands having

differences with their wives would hesitate from providing a separate residence for the wife for the fear of losing all rights thereto and the said residence after the lifetime of the wife going into the hands of her heirs. Similarly husbands owning property would fear bequeathing a life estate therein to their wives.

D. The additional reasoning given in *Nazar Singh* of acquisition of the property under a compromise being different from acquisition of property under a Will owing to the Will being not mentioned in Section 14(1), as aforesaid does not appear to be correct.

E. The plaintiffs in the Memorandum of Family Settlement expressly agreed that the plaintiffs no.2&3 shall cease to have any right of residence in the flat after their marriage and will not claim any interest, right or title whatsoever in the flat and that the plaintiff no.1 shall also cease to have any right of residence in the flat if she remarries or resides at another place and that the right of residence of the plaintiff no.1 in the said flat was for her life time only. The plaintiffs further agreed that they shall not claim any right in future over any property of the defendant no.2. The plaintiffs further agreed that after the marriage of the plaintiffs no.2&3 it will be the defendant no.2 who would be entitled to the rent of the third floor of the flat. The plaintiffs presented the said Memorandum of Family Settlement before the Court and before the Court also undertook to abide by the terms & conditions of the Settlement and not to file any claim, petition, complaint or other proceeding against the defendant in any Court of law. I have wondered whether not the very institution

of the present suit is in violation of the undertaking given by the plaintiffs to the Court at the time of culmination of the earlier litigation and whether the plaintiffs are entitled to do so. Though undoubtedly in some of the judgments cited by the senior counsel for the plaintiffs also the decrees had been passed in terms of the agreements entered into (in *Santhosh* supra it was held that consent decrees must be construed having regard to the well settled legal position) but at the same time the Courts have held that such Family Settlements are to be honoured, upheld and enforced. It is not as if in the earlier litigation between the plaintiffs and the defendant no.2 any right of maintenance or residence of the plaintiffs against the defendant no.2 had been established. The matter was still at large. It is well-nigh possible that ultimately the plaintiffs may not have succeeded in any claim for maintenance against the defendant no.2. It would be against equity, in my opinion, to in such circumstances permit the plaintiffs to act in contravention of the Family Settlement and the undertaking given by them to the Court in the earlier proceedings.

39. The counsel for the defendants has contended that *Sadhu Singh* supra relies on *Karmi* supra which has been held to be not good law in *Shakuntala Devi* supra. It is also argued that *Karmi* supra was held to be *per incuriam* in *Thota Sesharathamma* supra.

40. However, *Karmi* supra is a judgment of a three Judge Bench of the Supreme Court and *V. Tulasamma* and *Shakuntala Devi* supra are also of the Bench of equal strength.

41. I also find that *Shivdev Kaur Vs. R.S. Grewal* (2013) 4 SCC 636, though pronounced prior to *Mahima*, remained to be noticed, also notices the conflict of opinion prevailing in the Supreme Court and though goes on to observe that a reference to a five Judge Bench is called for, but does not make such a reference finding in the facts of that case that there was no evidence on any pre-existing right. It was held that there was no presumption that the Hindu woman in that case was a destitute.

42. I also find *Karmi* supra to have been followed as recently as in *Jagan Singh Vs. Dhanwanti* (2012) 2 SCC 628 and in *Ramji Gupta Vs. Gopi Krishan Agarwal* (2013) 9 SCC 438. Mention may however be also made of the fact that the Division Bench of this Court in *Vipin Kumar Jain* supra and a co-ordinate Bench in *Paramjit Anand Vs. Mohan Lal Anand* 2018 SCC OnLine Del 8181 have opted for the other line of judgments.

43. Thus, I do not feel the need to take a different view than that taken by me in *Mahima* supra.

44. Axiomatically, it has but to be held that the defendant no.1 was/is not entitled to deal with the property No.B-2/84, Safdarjung Enclave, New Delhi in any manner whatsoever without the written consent of her three sons and the Gift Deed executed by her admittedly without the written consent of the plaintiff is contrary to the terms on which the property was held by the defendant no.1 and the defendant no.1 was not entitled to execute the Gift Deed. Once it is so, the Gift Deed is null and void and is declared to be so. However, the plaintiff, during the lifetime of defendant No.1 is not entitled to use of individual rights in the property wherefor

mandatory injunction is sought. The plaintiff is thus not entitled to the said relief.

45. A decree is accordingly passed, in favour of the plaintiff and against the defendants:-

- (i) of declaration that the property No.B-2/84, Safdarjung Enclave, New Delhi has been bequeathed by the deceased Om Parkash Parti to the defendant no.1 with restriction that alienation thereof or any part thereof can be only with the written consent of her three sons i.e. plaintiff, defendant no.1 and Arun Parti;
- (ii) of declaration of the Gift Deed dated 12th November, 2015 registered with the Office of the Sub Registrar, SR VIIA Sarojini Nagar, New Delhi as document Reg. No.1219 as null and void and beyond the power of the defendant no.1 with respect to the property, second floor with terrace rights whereof has been gifted thereunder.
- (iii) the Sub Registrar of documents with whom the aforesaid gift deed is registered is directed to, on the plaintiff presenting a certified copy of this judgment and decree, record in his/her records the cancellation of the document by the said judgment and decree; and,
- (iv) of permanent injunction restraining the defendants from alienating, encumbering or parting with possession of property No.B-2/84, Safdarjung Enclave, New Delhi or any part thereof save with the written consent of the plaintiff; however the

same will not come in the way of the defendant no.1 letting out the property and realizing rent thereof and dealing with the tenants as per her absolute discretion.

No costs.

Decree sheet be drawn up.

APRIL 23, 2020
'pp/gsr'

RAJIV SAHAI ENDLAW, J.

