(2018) 05 DEL CK 0339

In the Delhi High Court

Case No : CS(OS) 558 OF 2013, IA No.14356 OF 2017

TARINI MEHTA APPELLANT

Vs

SANJEEV CHHABRA & ORS RESPONDENT

Date of Decision : 24-05-2018

Acts Referred:

Transfer of Property Act, 1882 — Section 6(1), 7, 44, 19
Indian Succession Act, 1925 — Section 119, 147
Partition Act, 1893 — Section 4
Code Of Criminal Procedure, 1973 — Section 145
Code Of Civil Procedure, 1908 — Order 39 Rule 1, Order 39 Rule 2

Citation : (2018) 05 DEL CK 0339

Hon'ble Judges : YOGESH KHANNA

Bench : Single Bench

Advocate : A.K.Singla, Rahul Shukla, B.S.Maan, Smita Maan, Warisha Farast, Suhail R Bhat, Katyani, Mehak Rastogi

Final Decision : Disposed Of

Judgement

YOGESH KHANNA, J.

IA No.4950/2013

1. This application is under Order 39 Rule 1 and 2 CPC. One Goverdhan Lal Obhroi was the owner of the suit property admeasuring 1066 square

yards bearing No.3A, Ring Road, Lajpat Nagar-IV, New Delhi by virtue of lease deed dated 22.06.1964 duly registered as document No.2638 in

additional book No.1, Volume No.1119, page Nos.90-93 in the office of Sub Registrar, Delhi.

2. He executed a Will dated 27.06.1983 in which he gave life time interest to his wife Smt.Sharda Obhroi and after her death, created further life

interest, in the estate, for his two daughters viz defendant Nos.3 & 6 herein and only on the death of his daughters viz defendant Nos.3 & 6, the

property would vest in the daughters of defendant Nos.3 & 6. The plaintiff being the daughter of defendant No.6 and defendant Nos.4 & 5 being the

daughters of defendant No.3 were to acquire the property as absolute owners in the event of the demise of their mothers namely defendants No.3 &

6.

3. The plaintiff and defendants are aware of the execution of the Will. After the death of late Goverdhan Lal Obhroi on 30.10.1983, the suit property

was mutated in the name of Smt.Sharda Obhroi in terms of the Will. Late Smt.Sharda Obhroi got the property converted into free hold and a deed of

conveyance dated 09.07.2003 was duly registered. She submitted the plan for reconstruction of the house and it was approved by the MCD, but

during the construction of the building, she expired. After her demise, the property devolved upon the mother of the plaintiff viz defendant No.6 and

upon the mother of defendants No.4 & 5 viz defendant No.3 in equal proportions as life estate interest. The defendant No.6/mother of the plaintiff

spent huge amount for construction of the existing structure.

4. The counsel for defendants No.1 and 2 argued though the Will of Late Mr.Goverdhan Lal Obhroi created a life interest for his wife and then for his

daughters viz. defendants No.3 and 6 but the ultimate beneficiaries were his grandchildren viz, the plaintiff and defendants No.4 and 5 and hence the

defendants no.4 and 5 do have a vested right in the property per Section 19 of the Transfer of Property Act, 1882 which read as under:

19. Vested interest.â?"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.â?"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.

5. The learned counsel for the defendant also referred to Section 119 of the Indian Succession Act, 1925 which read as under:119. Date of vesting of

legacy when payment or possession postponed.â?"Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing

bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the Will, become vested in the legatee on the

testatorâ??s death, and shall pass to the legateeâ??s representatives if he dies before that time and without having received the legacy, and in such

cases the legacy is from the testatorâ??s death said to be vested in interest.Explanation.â?"An intention that a legacy to any person shall not become

vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or

whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be

accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person.

Illustrations

(i) A bequeaths to B 100 rupees, to be paid to him at the death of C. On Aâ??s death the legacy becomes vested in interest in B, and if he dies before

C, his representatives are entitled to the legacy.

(ii) A bequeaths to B 100 rupees, to be paid to him upon his attaining the age of 18. On Aâ??s death the legacy becomes vested in interest in B.

(iii) A fund is bequeathed to A for life, and after his death to B. On the testatorâ??s death the legacy to B becomes vested in interest in B.

(iv) A fund is bequeathed to A until B attains the age of 18 and then to B. The legacy to B is vested in interest from the testatorâ??s death.

(v) A bequeaths the whole of his property to B upon trust to pay certain debts out of the income and then to make over the fund to C. At Aâ??s death

the gift to C becomes vested in interest in him.

(vi) A fund is bequeathed to A, B and C in equal shares to be paid to them on their attaining the age of 18, respectively, with a proviso that, if all of

them die under the age of 18, the legacy shall devolve upon D. On the death of the testator, the shares vested in interest in A, B and C, subject to be divested in case A, B and C shall all die under 18 and, upon the death of any of them (except the last survivor) under the age of 18, his vested interest

passes, so subject, to his representatives.

6. The learned counsel for the defendants then referred to Mahesh Chand Sharma V. Raj Kumari Sharma AIR 1996 SC 869 to support his contention:

16. We shall first examine the effect of the Will executed by Ram Nath in the year 1942, the correctness or validity whereof is not in question before

us. On the date he executed the Will, he had a son and four daughters. Out of the properties held by him, he gave one house property, viz., No.5,

Doctors Lane, New Delhi to his wife, Satyawati, for her life. He declared that during her life time, she shall have the exclusive right to reside therein

but that she shall not be entitled to transfer it in any manner. After her death, he declared, the property will go to ""the legal heirs of the testator"". On

the date of death of Ram Nath, it is agreed by all the parties before us, first defendant was the only ""legal heir of the testator"". It is equally not in

dispute before us that on the date of death of Satyawati, the "" legal heirs of the testator"" are the first defendant, the plaintiff and Defendant Nos.6 to 8

by virtue of the provisions contained in the Hindu Succession Act, 1956.

17. The first and crucial question is whether on the language of the Will and the law governing the Wills, the vesting in ""the legal heirs of the testator

took place on the date of death of testator (as contended by the appellant) or on the date of death of Satyawati as contended by the plaintiff-

respondent). In other words, the question is whether it is Section 119 of the Indian Succession Act that is attracted or the exception to Section 111 of

the said Act. If it is Section 119 that is attracted, the position would be that the remainder interest did vest in the first defendant on the date of death of

Ram Nath which means that the daughters will have no right in the Doctor's Lane House. On the other hand, if it is the exception to Section 111 that

applies, the vesting takes place on the date of death of Satyawati, which means son and four daughters together will be ""the legal heirs of the testator"".

26. The next question is what happened in the year 1955 when there was a settlement between Satyawati and the first defendant and what is its

effect? As mentioned hereinbefore, soon after the death of Ram Nath in the year 1953, disputes arose between Satyawati and the first defendant. As

many as seven suits were filed by one against the other. The first defendant had put forward a rival Will, said to have been executed by Ram Nath in

the year 1950, whereunder the Doctor's Lane house was given to the first defendant. It appears that pending the said suits, there was a reference to

arbitration and an award was also rendered by the Arbitrator, one Sri Chanan Ram. Obviously, the award did not put an end to the disputes between

the mother and the son. Only later and evidently at the intercession of certain mutual well-wishers, the parties arrived at a settlement whereunder the

said award was declared ineffective and a different arrangement arrived at. Under this settlement, the first defendant (described as `plaintiff') was

declared to be the owner of all the properties left by Ram Nath including Doctor's Lane house- except No.58, Todar Mal Road, New Delhi. At the

same time, Satyawati was given the right of residence in the first floor of the Doctor's Lane house along with case maintenance of Rs.125/- per

month. It was stipulated that if she resides in the said portion, the first defendant shall pay her only a monthly maintenance of Rs.125/-. But if she did

not intend to reside in the said portion, the first defendant was to pay her Rs.150/- per month. Thus, on the plain language of the settlement, the

Doctor's Lane house became the property of the first defendant subject to the right of residence given to Satyawati in the first floor thereof. Sri

Bhandare, learned counsel for the respondent-plaintiff, contended that inasmuch as the interest given to Satyawati under the 1942 Will was a life

estate and not a widow's estate - with which proposition we agree - and because the Will prohibited her from transferring the said property, the said

settlement is incompetent and void since it amounts to a transfer. We are not prepared to agree. xxxxx

28. Now, we come to the third important event, viz the enforcement of the Hindu Succession Act and its effect. The Act came into force in June,

1956. By operation of Section 14 of the said Act, the right of residence given to Satyawati in the first floor of the Doctor's Lane house ripened into an

absolute title inasmuch as the said right was given to her in recognition of a pre-existing right to maintenance inhering in her. Even under the Hindu

Law obtaining prior to the enforcement of Hindu Adoptions and Maintenance Act, 1956, the son was under a personal obligation to maintain his

mother and he was bound to maintain her whether or not he inherited property from his father. [See Para 548 of Mulla's Hindu Law at P.552 (16th

Edn.)]. Under the settlement, Satyawati was given not only the right of residence in the first floor but also a sum of Rs.125/- per month in cash

towards her maintenance. It was further provided under the settlement that if Satyawati did not intend to reside in the aforesaid portion, the first

defendant shall pay her Rs.150/- per month as maintenance instead of Rs.125/- per month. This clearly indicates that the right of residence was given

to her in lieu of and in recognition of her pre-existing right to maintenance. Once this is so, it is sub-section (1) of Section 14 that applies and not sub-

section (2) vide V. Tulasamma v. V. Sesha Reddi (1977 (3) S.C.C. 99). It has recently been held by a Bench of this Court (S.P. Bharucha, J. and one

of us, S.B. Majmudar, J.) in Mangat Mal v. Punni Devi (1995 (6) S.C.C.that a right of residence given for life to a female Hindu in a property plus a

sum of money in lieu of her right to maintenance ripens into full ownership on the coming into force of the Act. xxxxx ;

7. and he also referred to Swaran Singh Banda vs. Manpreet Singh Chhatwal & Ors 2009 (109) DRJ 482 (DB) wherein it has been held:-

20. Learned counsel referred to certain judgments of different courts in respect of the aspect of vested interest. In Usha Subbarao V.

B.E.Vishveswariah; AIR 1986 SC 2260, it was observed that whether a bequest creates a vested interest or contingent interest depends upon

intention to be gathered from a comprehensive view of all the terms of the document creating the interest, but while construing the terms, the Court

should proceed with a bias in favour of the vested interest. In the facts of the case, while looking to the provisions of Section 119 and 120 of the Indian

Succession Act, 1925 (the Indian Succession Act for short) where a legatee was allowed to enjoy the income from bequeathed properties even during

the period rights of separate enjoyment were not available to the legatee and there was a postponement of the right to claim partition of the house to

the date when the wife of testator died, the bequeath under the Will was held not to be a contingent interest but a vested interest. In P.Somasundaram

v. K.Rajammal; AIR 1976 Madras 295, the testator expressed an unambiguous intention that his wife, daughter-in-law and granddaughter would

maintain themselves out of the income of the properties during the lifetime of the wife and the daughter-in-law. After the lifetime of the wife and

daughter-in-law, the grand-daughter was to get the property absolutely. It was held that the date of vesting in the grand daughter was the date of the testatorâ??s death. The distinction between a vested and a contingent bequest was explained and it was observed that an interest is stated to be vested

when it is not subject to any condition precedent, when it is to take the effect on the happening of an event which is certain, whereas an estate is

contingent when the right to enjoyment depends upon the happening of an uncertain event which may or may not happen. Thus a person takes a

vested interest in a property at the testatorâ??s death when he acquires a proprietary right in it at the that time; but the right of enjoyment is only

deferred till a future event happens which is certain to happen. On the other hand, a contingent interest is one in which neither any proprietary interest

nor a right of enjoyment is given at the testatorâ??s death, but both depend upon future uncertain events. Similar are the observations in Chilamakuri

Chinna Pullappa v. Guraka Chinna Bayanna and Ors; AIR 1962 AP 54 and Smt.Kapuri Kuer v. Sham Narain Prasad and Ors; AIR 1962 Patna 149.

37. If the aforesaid plea is accepted, the question arises as to how this portion of the estate which would devolve on Sardarni Onkar Kaur as her

absolute interest was treated by her legal heirs. This portion would in turn get divided between the plaintiffs on the one hand being the legal heirs of a

pre-deceased son as also the remaining two sons and daughters. The daughters have categorically given affidavits abandoning their rights in the

property when the issue arose as to who should be recorded as the lessee of the property with the L&DO. It cannot be said that these daughters

reserved the right to claim a share even after furnishing affidavits to the L&DO. The L&DO is the perpetual lessor of the property and in that sense

there is some distinction between a freehold and a leasehold property. In a freehold property, the mutation is carried out by the Municipal Corporation

for purposes of house tax. However, the mutation by the L&DO in its records is carried out to record as to who is the owner of the property on the

demise of a person. The affidavits by the sisters clearly imply that they release the interest in favour of the plaintiffs to the extent it devolved on them

from their mother. It is not a case where the mutation has been made in the absence of appropriate documents, but has been done in pursuance to the

affidavits.

38. The sisters did not have any inherited right in the property, but claimed a right only by devolution of interest by succession from Sardarni Onkar

Kuar. It was always open to them to step aside and not accept the interest and let it pass on to the other legal heirs. This is exactly what the sisters

have done and possibly in furtherance to the overall intent of the testator.

8. The crux of the arguments of learned counsel for the defendants No.1 & 2 is on the date of the death of Goverdhan Lal Obhroi, the defendants

No.4 & 5 as well as the plaintiff had acquired vested proprietary rights in the property, though its enjoyment and possession was deferred till after the

death of their mothers viz. defendants No.3 & 6 who held a life interest in such property. It was argued such life interest as was created by Will of

late Goverdhan Lal Obhroi could very well be surrendered in favour of the ultimate beneficiaries as has been recognized by Swaran Singh Banda

(supra). Such surrender of interest, even otherwise, can never be challenged by the plaintiff herein since the Will of Goverdhan Lal Obhroi refer to

two properties bequeathed in similar manner to the parties, â?" one of the Lajpat Nagar, New Delhi (the subject property) and another at Dehradun.

Admittedly, the defendant No.3, the mother of the defendants No.4 & 5 had sold her 50% undivided share in the property at Dehradun to the husband

of defendant No.6 viz. the father of the plaintiff which the plaintiff conveniently did not object as the said sale deed is in favour of her father and

hence now she is estopped from raising objections qua sale of their shares by defendants no.3 to 5 in the subject property at Delhi. It is alleged such

share was sold on the basis of a memorandum of Family Settlement /Deed of Partition dated 16.12.2010 and clause No.7 of such family settlement

enable defendants no.3 to 5 to do such act:

7. If at any time any of the parties desires to sell or transfer her undivided one-half share in the Property including the right to use the allocated

Premises, the party so desiring to effect the sale or transfer shall give a right of first refusal to the other party, to be exercised in 30 days from the

receipt of notice.

9. Such no objection was given by the defendant No.6 in favour of defendant No.3 herein in the following manner:-

To

Gitanjali Khanna

I have no objection if you sell your portion of 3A, Ring Road, Lajpat Nagar-IV, New Delhi â?" 110024 to Mr.Sanjeev Chhabra, C-52, First Floor, Shivalik, New Delhi â?" 110017.

Yours faithfully

Radha Mehta

21.04.2012

New Delhi

10. It was only thereafter a sale deed dated 09.08.2012 was executed by the defendant No.6 as an attorney of her daughters viz. defendants No.4 &

5 in favour of defendants No.1 & 2. The sale deed record all the above facts, hence, cannot be said to be invalid and the plaintiff is estopped from

challenging the same.

11. The learned counsel for the defendants says the whole controversy involved in this case is qua the date of vesting of the estate, and per Section

119 (supra) and the said date is the date of death of testator, on which date the defendants no.4 and 5 got proprietary rights in the subject property and

thus had full authority to deal with such estate.

12. Qua the sanctity of family settlement the defendants relied upon Vimla Moga and another vs Ramlubhai and Another 2014 (142) DRJ 550 which

notes:

29. Learned counsel for the defendant no.2 has vehemently contended that the family arrangement cannot be read in evidence as it is unstamped and

unregistered document. Reliance has been placed on Narendra Kante vs. Anuradha Kante and Ors. 2010 (2) SCC 77, Bankey Bihari vs. Surya

Narain 2004 (11) SCC 393 and Jagdish Kumar Sachdeva vs. Subhash Chander Sachdeva 2011 (V) AD (Delhi) 463. Per contra, learned senior

counsel for the plaintiff has vehemently contended that after the death of Shri J.N. Monga family members orally discussed about the partition of

assets of family which later on was recorded in writing vide Ex.P-2, thus, no registration under Section 17 of the Registration Act, 1908 (hereinafter

referred to as â??the Actâ??) was required and the same can be read in evidence. Reliance has been placed on Kale and others vs. Deputy Director

of Consolidation and others AIR 1976 SC 807. It has been further contended that the family arrangement was bonafide and arrived at between the

members of the family to resolve the family disputes once for all by fair and equitable allotment of assets between the respective branches of the

family, thus, was liable to be enforced for establishing or ensuring amity and goodwill amongst the persons bearing relationship with one another. It is

further contended that if the Court finds that a family arrangement has been entered into between the family members bonafidely and the terms

thereof are fair in the circumstances of a particular case, Courts will more readily give assent to such an arrangement than to avoid it. Reliance has

been placed on Hari Shankar Singhania & Ors. Vs. Gaur Hari Singhania & Ors. AIR 2006 SC 2488, Ram Charan Das vs. Girja Nandini and others

AIR 1966 SC 323.

xxx

31. In Kale (Supra), Supreme Court has held that family arrangement may be even oral, in which case no registration is necessary; Registration would

be necessary only if the terms are reduced to writing but there also a distinction should be made between a document containing the terms and recitals

of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for

the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or

extinguish any rights in the immovable properties and therefore does not fall within the mischief of S. 17(2) of the Registration Act nor is it

compulsorily registrable. It has been further held that a document, which was no more than a memorandum of what was agreed to, did not require

registration.

13. The learned counsel for the defendant also referred to Kale and others vs Deputy Director of Consolidation and Others (176) 3 SCC 119 which

notes:

â??38. Rebutting the arguments of the learned counsel for the appellant, Mr. Sharma for the respondents, contended that no question of estoppel

would arise in the instant case inasmuch as if the document was to be compulsorily registrable there can be no estoppel against the statute. In the first

place in view of the fact that the family arrangement was oral and the mutation petition was merely filed before the Court of the Assistant

Commissioner for information and for mutation in pursuance of the compromise, the document was not required to be registered, therefore, the principle that there is no estoppel against the statute does not apply to the present case. Assuming, however, that the said document was compulsorily

registrable the Courts have generally held that a family arrangement being binding on the parties to it would operate as an estoppel by preventing the

parties after having taken advantage under the arrangement to resile from the same or try to revoke it. This principle has been established by several

decisions of this Court as also of the Privy Council. xxx

In these circumstances there can be no doubt that even if the family settlement was not registered it would operate as a complete estoppel against

respondents 4 & 5. Respondent` No. 1 as also the High Court, therefore, committed substantial error of law in not giving effect to the doctrine of

estoppel as spelt out by this Court in so many cases.â??

14. Thus it was argued by the learned counsel for the defendants that even if the plaintiff succeeds then also ultimately the property would fell in the

hands of defendants no.3 to 5 and the plaintiff could enjoy/use only her portion of the property and per equity if the plaintiffâ??s father had purchased

the share of defendantâ??s no.3 to 5 in Dehradun property then how could the plaintiff estop the defendants no.3 to 5 to sell their share in the subject

property at Lajpat Nagar, New Delhi.

15. Similar are the arguments of defendants no. 3 to 5.

16. However it is alleged by the plaintiff the defendants No.3 & 6 has a life interest in the estate and could enjoy it personally, but had no right to sell

the property being holders of such lifetime interest. The defendants No.3 tried to sell her undivided lifetime interest in the property to strangers to the

family viz. defendants no.1 and 2 through sale instruments. Admittedly defendant No.6 lodged a protest petition on 16.07.2012 to the Sub-Registrar

â?" V, New Delhi requesting the Registrar not to register the documents, purportedly, executed in respect of Â½ undivided lifetime interest of

defendant no.3 in the suit property.

17. On the basis of such sale instruments, the defendants No.1 & 2 along with their associates tried to take forcible possession of the suit property, but

due to the intervention of the police, they could not do so. The defendant No.6 later received a letter / notice dated 27.08.2012 from Sub-Registrar â?

V, New Delhi to the effect the defendant No.3 had presented an instrument / sale deed for registration in favour of the defendants No.1 & 2. The plaintiff then went to the office of the SubRegistrar and filed objections on 14.09.2012. The plaintiff also filed a Civil Suit No.323/2012 before the Civil

Judge, Saket Courts, New Delhi for a decree of permanent injunction against the defendants No.1 & 2 from presenting any document for sale of the

property. Defendant Nos.1 & 2 also filed CS (OS) No.196/2006; and W.P.(C) No.7631/2012 and somehow managed to get the sale deed registered

on 31.12.2012 in their favour.

18. The sale deed dated 31.12.2012 refers to a memorandum of family settlement dated 16.12.2010 saying the suit property has been partitioned

between defendants No.3 & 6, but it is alleged by the plaintiff such memorandum of family settlement was never acted upon by her as it is an

unregistered document. It is alleged the family settlement dated 16.12.2010 does not bind the plaintiff as the defendants No.3 & 6 having only their

lifetime interest, could not have entered into any such agreement and even otherwise, such agreement being unstamped and unregistered has no force

in law. The sale deed also refers to note dated 21.04.2012, but it does not bind the plaintiff as the defendants No.3 and 6 only has a lifetime interest for

enjoyment of the property and when defendant No.6 is not competent to sell her life estate, how she could have consented to defendant no.3 for

selling her share to defendants no.1 and 2. Admittedly, the physical possession of the suit property has not been handed over to defendants No.1 & 2.

19. The plaintiff thus, has challenged the sale on the following grounds viz:-

a) the sale is hit by the provisions of Section 147 of the Indian Succession Act;

b) the sale is hit by Section 6(1) (d) and Section 44 of the Transfer of the Property Act;

c) the sale is hit by Section 4 of the Partition Act.

20. To begin with, Section 147 of the Indian Succession Act, read as under:-

147. Retention, in form, of specific bequest to several persons in succession.â?"Where property is specifically bequeathed to two or more persons in

succession, it shall be retained in the form in which the testator left it, although it may be of such a nature that its value is continually decreasing.

Illustrations:--

(i) A, having lease of a house for a term of years, fifteen of which were unexpired at the time of his death, has bequeathed the lease to B for his life, and after Bâ??s death to C. B is to enjoy the property as A left it, although, if B lives for fifteen years, C can take nothing under the bequest.

(ii) A, having an annuity during the life of B, bequeaths it to C, for his life, and, after Câ??s death, to D. C is to enjoy the annuity as A left it, although,

if B dies before D, D can take nothing under the bequest.

21. In Shriman Prabahan Mitra vs. Smt.Madhuri Mitra & Ors AIR 1985 Caclutta 368 the Supreme Court held as under:-

14. The first question that falls for consideration is whether the agreement to sell of 17 Kattas and odd land including the main building in premises No.

25, Mandevilla Garden, Calcutta, executed on 6th April 1976 is hit by Section 147 of the Indian Succession Act. Section 147 provides that property

specifically bequeathed to two or more"" persons in succession has to be retained in the form in which the testator left it although its value may

continually decrease. This provision clearly applies to the instant case. The property in 25, Mandevilla Garden has been bequeathed in succession to

Sm. Madhuri Mitra during her lifetime, then to her son Sri Ajoy Kumar Mitra during his lifetime and then to the daughter-in-law Sm. Krishna Mitra

during her lifetime and after the death of Sm. Krishna Mitra the property will vest absolutely in the son or sons of Ajoy and Krishna or in the absence

of any son to them surviving at that time the property will vest in the Calcutta University for a stipend. It is, therefore, clear that the property has to be

kept in specie and it will vest absolutely after the death of the last life interest holder Smt. Krishna Mitra to her son or sons if surviving at the time of

her death and in absence to the Calcutta University. In such circumstances, the said transfer by the said agreement for sale made by the life estate

holders is contrary to the express desire of the testator as embodied in the Will. Therefore the argument that the said contract is hit by S. 147 of the

Indian Succession Act has got merit and it succeeds. The agreement is not a legal agreement and the same cannot be enforced. The agreement is

also not enforceable as the contract is a contingent one and the contingency is yet to occur. In term No. 4 of the said agreement it has been expressly

provided that the vendors will take all steps to make out a good marketable title in respect of the suit property upon surrendering life interests of the

vendors of the first, second and third part in favour of the vendor of the fourth part, that is, the minor son Probahan Mitra and upon obtaining the permission of the Court for the sale of the said property and also upon obtaining necessary permission from the authorities under the Urban Land

(Ceiling and Regulations) Act, 1976 to execute the deed of conveyance. â?¦â?¦. xxxxx xxxx

22. Further in Raj Kumari Sharma vs. Rajinder Nath Dewan & Ors AIR 1987 Delhi 323 this Court held:-

(17) It is unnecessary to deal separately with several cases cited at the Bar before the learned Single Judge and again before us on the question of

law of surrender by a widow, under strict. Hindu Law because of our view that Satyawati was given the life estate' and not 'widow's estate'. As

stated in Hindu Law by Mulla 15th Ed. Para 197, there can be surrender of estate by a widow in the circumstances stated therein and the cases relied

upon. The principle upon which the whole transaction rests is the effacement of the widow an effacement which in other circumstances is effected by

actual death or civil death-which opens the estate of deceased husband to his next heirs at that date. Under the Will she had no power to transfer the

property in any manner whatsoever and, therefore, she could not relinquish or abandon her rights in the said property beyond her lifetime. We are

unable to accept the argument of Mr. Arun Mohan that there is no principle of law or authority to be found which may take the view that a life estate

holder has no power to surrender the same in favor of the remainderman. Reliance by the counsel on Rudra Pratap Singh & Anr. v. Mt. Umral

Kunwar and Anr, Air 1918 Oudh 389 is misplaced. It. was merely stated there that transfer effected by the widow of her life interest in favor of

remainderman, operates as a surrender, accelerating the devolution in favor of the latter by relying on the decision in Behari Lul v. Madho Lal Ahir

Guyawal 19 I.A 30 (PC). The latter case dealt with the surrender by the widow or other limited heir of the estate inherited by her under Hindu Law

and not bequeathed to her as life estate', under a Will. Surrender of her estate by a widow inherited under Hindu Law stands on a different fooling.

No reasoning is advanced for extending this principle in Rudra's case. In this case, Smt. Satyawati had absolutely no right to surrender any right, title

and interest in any manner whatsoever and in fact she was prohibited from transferring the property. She had only a '""life estate"" with limited rights to

pass on the estate to legal heirs of the testator. There can be no surrender accelerating the devolution ""in favor of the legal heirs of the testator"" which is a gift to a cla.ss of persons to be ascertained later.â??

23. In Prabahan Mitra (supra), the Supreme Court observed:-

16. The impugned agreement for sale executed by the life interest holders who were given mere right of residence in the building at 25, Mandeville

Gardens is not in accordance with law as under Section 6, clause (d) of the T.P. Act. These life-interest holders are not entitled to transfer their such

restricted interest in the suit property. â?¦..

24. The above section as also the law above warrants the life interest has to be retained in the shape of a life interest and the person holding such

interest cannot execute a conveyance and if executed, shall be null and void.

25. Reverting to contentions b) and c) above I may first note the relevant provisions of Transfer of Property Act viz.:-

â??6. What may be transferred.â?"Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the

time being in force,â?" (a) xxxx

(b) xxxx

(c) xxxx

(d) All interest in property restricted in its enjoyment to the owner personally cannot be transferred by him;

1) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred;

44. Transfer by one co-owner.â?"Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share

of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer,

the transferorâ??s right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the

conditions and liabilities affecting at the date of the transfer, the share or interest so transferred. Where the transferee of a share of a dwelling-house

belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other

common or part enjoyment of the house.â??

26. And section 4 of the Partition Act read as under:

4. Partition suit by transferee of share in dwelling-house.â?

1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such

transferee sues for partition, the court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make

a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper

directions in that behalf.

2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the

court shall follow the procedure prescribed by sub-section (2) of the last foregoing section.

27. In Ashim Ranjan Das Vs Sm. Bimla Ghosh & Others AIR 1992 Cal 44 it was held:

In Paresh Nath v. Kamal Krishna, , it was held that upon a transfer of an undivided share of a family dwelling house by a co-sharer the other co-

sharer may maintain a suit for injunction restraining the strangertransferee from exercising any act of joint possession in respect of the share

transferred. A co-sharer is entitled to exercise his possession over every portion of his property. In Surendra Nath v. Ram Chandra, (1971) 75 CWN

195, this High Court went so far as to say that a stranger-purchaser is reduced to the position of a trespasser. His purchase vests in him title only and

gives him a right to sue for partition and nothing more. Section 44of the Transfer of Property Act negatives his claim to possession before partition.

Section 4 of Partition Act spells out his right to sue for partition. Former is the limit and the latter is extent of what he had acquired by purchase.

Supreme Court virtually gave a sanction to the legal proposition propounded in Surendra Nath's case (supra). In Dorab Cawasji v. Coomi Sorab, , the

Supreme Court approved the view of a High Court that once it is held that the plaintiff is entitled to protection under the second part of Section 44 of

the Transfer of Property Act and the strangerpurchasers are liable to be restrained it would follow that even if the defendants have been put in

possession or have come jointly to possess they can be kept out by injunction. The effect of that injunction would necessarily mean ejectment. The

remedy of the stranger-purchaser is actually one of partition. Until then, he is obliged to keep out from asserting joint possession. It has further been observed in paragraphs 25 and 28 that denial of right of injunction under Section 44 of the Transfer of Property Act would cause irreparable injury to

the other members of the family.

28. Now in the light of above law let me take a look the provisions of memorandum of family settlement/Deed of partition viz.,

(1) The parties hereto are co-owners having life interest in of the property bearing number BP-3, NH-IV, part III Lajpat Nagar, New Delhi 110024

measuring 1066.66 yards, together with building standing thereon and open land (Front, doorways front & left side to the building) passages described

fully in Schedule A and hold lifetime interest in the said property.

(2) The said property was initially allotted and leased out to Mr.Goverdhan Lal Obhrai s/o Diwan Chand by virtue of a Certificate of Sale and Lease

Deed duly registered as document No.2638 in the Addition Book No.1, Volme No.119 on pages 90 to 93 on April 14, 1964 in the office of the Sub-

Registrar, New Delhi.

(3) Mr. Goverdhan Lal Obhrai executed a will on June 27, 1983 whereby Smt. Sharda Obhrai, the wife of Mr.Goverdhan Lal Obhrai, was given a life

estate in the said property. As per the provisions of the will, after Mr.Goverdhan Lal Obhraiâ??s demise, his two daughters, namely Mrs. Gitanjali

Khanna (Gita Khanna) and Mrs. Radha Mehta will have life interest in the said property. Thereafter, the said property would vest in their children

with one half of the property vesting in the two daughters of Mrs. Gitanjali Khanna viz. Mrs. (Ms.) (Bindiya) Khanna wife of Mr.Rahoul Puri and

Miss Ms. Akhila Khanna, the two daughters of Mrs. Gitanjali Khanna and the other half of the said property vesting in the daughter of Mrs. Radha

Mehta viz. MissMs.Tarini Mehta, the daughter of Mrs. Radha Mehta. The said Ms.Bindiya Khanna, Ms.Akhila Khanna and Ms.Tarini Mehta are

hereinafter collectively referred to as the Beneficiariesâ??.

xxx

(9) The Delhi Municipal Corporation has done mutation in the name of Mrs. Gitanjali Khanna and Radha Mehta vide letter no.Tax/ cent.Zone/1932

dated 19.7.2010.

xxx

(13) the parties desire to effect a partition record the terms and conditions of the

aforesaid mutual understanding arrived at of the said properties

between themselves and no longer desire to continue as joint life interest holders/owners of the said property as the same would not be in the interest

of their individual plans to enjoy the property as well as for other diverse reasons as recoded hereinafter. The consent of the ultimate beneficiaries of

the Will, all of whom are majors, have been obtained in this regard.

xxx

Now this memorandum recording family settlement witnesseth and it is hereby agreed by and between the parties hereto as follows :- witnesseth as

follows xxx

(2) It is hereby expressly mutually agreed that each of the parties hereto and/or their respective heirs, executors, administrators and assigns shall be

entitled to use, possess and deal with their respective Premises in such manner as they may deem fit provided that such use is (i) permissible under

law, (ii) it is not in violation of any rules, regulations or by laws of any government or local authority, (iii) it does not create nuisance to the other party;

and (iv) the concerned party shall have obtained all necessary approvals/ permissions NOCs from the concerned authorities as also of the

Beneficiaries.

(17) The parties shall register this presents with the concerned SubRegistrar and the Stamp duty and the registration charges shall be borne by the

parties in equal shares.

29. Admittedly the plaintiff is not obstructing defendant nos. 3 to 5 from entering into the property or from using it. The issue is only qua allowing of

strangers in a dwelling unit. The defendants though relying upon Family Settlement but its clause 13 notes the transfer of shares/partition is effected by

this instrument only and hence per Vimal Monga (supra), such instrument requires registration. The intention of parties is further clarified by clause 17

(supra) and it gives credence to the argument of plaintiff viz., the partition was affected by this document and it require registration and payment of

stamp duty which admittedly was never done and hence raise a pertinent question qua admissibility of such document under the law.

30. In Ratan Lal And Ors. vs Hari Shanker And Ors. AIR 1980 Allahabad 180 it was held: if the memorandum of family settlement is nothing but a

deed of partition creating rights in favour of the parties and if it is unregistered, unstamped it cannot be seen even for collateral purposes.

31. Moreso the consent letter/no objection given by defendant No.6 in favour of defendant No.3 to sell her undivided portion is also hit by Section 7 of

Transfer of Property Act as was given by person not competent to transfer it. Even otherwise, in the alternative, it amounts to allowing something

which is prohibited by four conditions set out in para 14(2) of family settlement itself.

32. Clause 14(2) of the settlement runs as under:

It is hereby expressly mutually agreed that each of the parties hereto and/or their respective heirs, executors, administrators and assigns shall be

entitled to use, possess and deal with their respective Premises in such manner as they may deem fit provided that such use is (i) permissible under

law, (ii) it is not in violation of any rules, regulations or by laws of any government or local authority, (iii) it does not create nuisance to the other party;

and (iv) the concerned party shall have obtained all necessary approvals/ permissions/NOCs from the concerned authorities as also of the

Beneficiaries.

33. As per clause 14(2) the property cannot be divided in violation of the bylaws of the Government or local authorities. Hence the question arises a) if

the division of the plot is permissible under the Delhi Municipal Corporation Rules and b) if such user by a stranger would create a nuisance to the

plaintiff are some issues which need to be settled in trial. The divisional drawing of the property do show there exist only one gate to enter into the

premises; one stairs to go to upper floors which may cause inconvenience to the user of the premises by other co-owners.

34. Admittedly the sale deed dated 09.08.2012 was got registered in March 2013 despite the objections raised by the plaintiff before the SubRegistrar

and attempts made by defendants no.1 and 2 to gain entry into the undivided premises were rebutted vide various police complaints; even a kalandara

under Section 145 of Cr.P.C. was filed. In the light of this, a question would arose if defendants No.1 and 2, being strangers to the family, can be

allowed to live in the dwelling house?

35. Admittedly defendant No.3 did not receive full consideration despite the registration of sale deed and where allegations are the defendant No.1

was a Chartered Accountant of late Smt.Sharda Obhroi, the late mother and also of defendants no.3 and 6 and despite being in fiduciary capacity did

not disclose returns to Smt.Sharda Obhroi and to defendants No.3 and 6 and rather admitted before police he had withdrawn Rs.34 lakhs from the

account of Smt.Sharda Obhroi and a recovery suit is pending against him in Saket Courts; if allowed to sneak in the subject property would, prima

facie, be allowing a stranger in a dwelling house and would be a nuisance to the plaintiff, hence be in violation of clause 14(2) (supra).

36. Para 7 of the plaint in CS(OS) No.103/2016 says:

7. That that defendant No.1 worked as Chartered Accountant for plaintiff as well her Mother Late Mrs. Sharda Oberai. Taking advantage of plaintiff

being alone, upon her daughter (Ms. Tarini Mehta) pursuing her LL.M study at Cambridge University UK and her husband visiting Argentina,

fraudulently obtained a handwritten NOC on 21.04.2012 from plaintiff on the pretext that the defendant No.3 in urgent need of money. The plaintiff

after consultation with her family members over phone, immediately asked defendant No.1 to return note obtained by informing him that since he was

handling affairs of plaintiff, he is well aware that the plaintiff is not competent to make sign and issue any such NOC. The defendant No.1 in his

written statement did not deny he was a Chartered Accountant of Smt.Sharda Obhroi and her daughters.

37. The scope of the fiduciary relationship was discussed in RBI vs. Jayanti lal N.Mistry AIR 2016 SC 1 as follows: 56. (i) No Conflict rule- A

fiduciary must not place himself in a position where his own interests conflicts with that of his customer or the beneficiary. There must be real sensible

possibility of conflict.

(ii) No profit rule- a fiduciary must not profit from his position at the expense of his customer, the beneficiary;

(iii) Undivided loyalty rule- a fiduciary owes undivided loyalty to the beneficiary, not to place himself in a position where his duty towards one person

conflicts with a duty that he owes to another customer. A consequence of this duty is that a fiduciary must make available to a customer all the

information that is relevant to the customerâ??s affairs

(iv) Duty of confidentiality- a fiduciary must only use information obtained in confidence and must not use it for his own advantage, or for the benefit of another person. xxx

The word fiduciary,â?? as a noun, means one who holds a thing in trust for another, a trustee, a person holding the character of a trustee, or a

character analogous to that of a trustee, with respect to the trust and confidence involved in it and the scrupulous good faith and candor which it

requires; a person having the duty, created by his undertaking, to act primarily for anotherâ??s benefit in matters connected with such undertaking.

Also more specifically, in a statute, a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity

for any person, trust, or estate. Some examples of what, in particular connections, the term has been held to include and not to include are set out in

the note.

38. Another issue is if acceleration of devolution to the next generation is feasible. Life interest cannot be sold by any of the parties, as was held in

Prabhan Mitra (supra) and Smt.Raj Kumari Sharma (supra). The judgments relied upon by the defendants viz. Mahesh Chand Sharma (supra) and

Swaran Singh Banda (supra) only say about the vesting interests and the date of vesting; creation of proprietary right to the ultimate beneficiary and

its effect. None of the judgments throw light if vested interest can be sold by accelerating the devolution. Both cases have different facts and are not

applicable to this case as in Mahesh Chand Sharma (supra) the family settlement was given credence because of the two contesting Wills put on floor

and seven suits interse parties were filed, thus to avoid conflict in the family an oral understanding was put to writing which did not require registration.

Further in Swaran Singh Banda (supra) the sisters relinquished their proposed definite shares which they acquire by succession, which per se is not

the case here.

39. Even in Kale & Others (supra) the family settlement was oral and whereas in the present case the partition was effected by a document of Family

Settlement/Deed of Partition, hence require registration. The alleged no objection was given only by defendant no.6 and not by the plaintiff viz. the

ultimate beneficiary, hence its effect needs to be seen. Moreso the sale of Dehradun property was amongst the family members and not between an

outsider/Stranger, hence, the plaintiff do have a prima facie case. The three principles of injunction squarely fall in favour of the plaintiff. The defendants have failed to reply to the effect of Section 147 of the Indian Succession Act; Section 4 of the Partition Act; Section 44 and Section 6(1)

(d) of the Transfer of Property Act. Moreso the provisions of the MoU reveal it was â??primarilyâ?? entered into between the parties for enjoyment

of the subject property and use of respective portions by co-owners without obstruction. The application thus is allowed. However the defendants

No.3 to 5 are also free to use their portion of the subject property without obstruction.

40. No order as to costs.

41. Before parting with this order, it is to note that nothing observed herein shall tantamount to an observation on the merits of the case of parties

which is yet to be proved on the anvil of the trial.

IA No.607/2016

42. In view of peculiar nature of relief as sought in this application by the defendant No.6, the application becomes infructuous.

43. The application stands disposed of.

CS(OS) 558/2013

44. List along with connected matters i.e. CS (OS) No.3885/2014 and CS (OS) No.103/2016 on 29.08.2018, the date already fixed.

