

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

+ **RFA (OS) No. 159/2014**

% **Reserved on: 14th July, 2017**
Date of Decision: 31st July, 2017

VIPIN KUMAR JAIN Appellant
Through Mr. T.K. Ganju, Sr. Advocate with
Mr. Manik Ahluwalia, Mr. Abhishek
Bhardwaj and Ms. Swati R.Singh,
Advocates

versus

RAM BABU JAIN & ORS Respondents
Through Mr. J.P.Sengh, Sr. Advocate with
Mr. Girish Aggarwal
Ms. Manisha Mehta & Mr. Vaibhav
Jain, Advocates

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAVIN CHAWLA

SANJIV KHANNA, J.

This intra-Court appeal under Section 96 read with Order XLI of the Code of Civil Procedure, 1908 and Section 10 of Delhi High Court Act impugns order/judgment dated 25th September, 2014, allowing the application under Order XII Rule 6 of the aforesaid Code and the preliminary decree holding that each of the parties i.e. plaintiff Nos.1, 2, 3, the respondents before us, and defendant No.1, the appellant before us, are entitled to 1/4th share in flat No.C-4/31 at Rajasthali Apartments, Madhuban Chowk, Pitampura, Delhi.

2. The appellant and the three respondents are sons of late Ratan Lal Jain, who was the owner of the aforesaid flat and had executed the Will

dated 6th March, 2002. The said Will is undisputed and is not under challenge. Ratan Lal Jain had expired on 8th December, 2003 and was survived by the present appellant, the three respondents and wife-Shanti Devi Jain.

3. Shanti Devi Jain died on 10th May, 2011. After the death of Shanti Devi Jain, the respondents filed CS (OS) No.2370/2013, claiming that each one of the four siblings are entitled to ¼ share in the flat/property mentioned above. The appellant, however, claims that he is the sole and exclusive owner of the said flat relying upon the “Will” from late Shanti Devi Jain, which is in Form No.17 i.e. nomination form for transfer of share and interest after death furnished to the cooperative society. Whether the said Form No.17 is a valid Will etc. are not the subject matter of the present appeal or the impugned order. It is the subject matter of Test Case No.86 of 2011, which is pending.

4. Subject matter of the present appeal is clause (a) of the Will of late Ratan Lal Jain, which is as under:-

“That so long as I am alive, I shall remain the sole and absolute owner of the aforesaid properties both moveable and immovable and after my death the aforesaid properties shall go and devolve in the following manner:-

a) Residential Flat bearing No.C-4/31, situated at Rajasthali Apartments, Madhuban Chowk, Pitam Pura, Delhi-110034 and all other properties both moveable and immovable belonging to me at the time of my death in favour of my wife Smt. Shanti Devi Jain for her life time only, who shall have the life interest in the aforesaid residential flat, but she shall have no right to sell, transfer or alienate the same in any manner and after her death the said property shall go and evolve on all my four sons namely Ram Baboo Jain, Omprakash Jain, Vipin Kumar Jain

and Pavan Kumar Jain, who shall be the sole and absolute owners thereof in equal shares and shall have full right to hold, use, enjoy and transfer the same in any manner, they like and my other heirs and successor shall have no right, title, interest, claim or concern of any nature whatsoever with the said flat. Since my three sons namely Ram Baboo Jain, Omprakash Jain and Pavan Kumar Jain are already staying out of station and they shall have full right to stay in the aforesaid flat temporarily or permanently with their families at any time. In case if my wife said Smt. Shanti Devi Jain predecease me then the said property shall go and devolve on all my four sons aforesaid.”

The contention of the respondents which has been accepted in the impugned order is that late Shanti Devi Jain, the mother was given a limited estate or life interest with no right to sell, transfer or alienate the property. After her death, the property was to devolve on the appellant and the three respondents in equal share. The appellant claims that this life interest in favour of the late mother-Shanti Devi Jain made her the absolute owner of the flat and, therefore, the bequest made by her in Form No.17 in favour of the appellant would be operative. The bequest made by late Ratan Lal Jain in favour of the appellant and the three respondents in equal share would be inoperative and invalid in view of Section 14 of the Hindu Succession Act, 1956 (Act, for short).

5. Section 14 of the Act deals with inheritance of property by a female Hindu and reads as under:-

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

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

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

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

Sub-section (1) of Section 14 states that female Hindu shall be absolute or full owner and not limited owner of any property possessed by her, whether acquired before or after commencement of the Act. Explanation states that 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. Sub-section (2) of Section 14 states that 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 etc. which prescribes a restricted estate in such property.

6. The difference between the two sub-sections has been a subject matter of several decisions of the Supreme Court wherein it has been uniformly held that where a female Hindu has a pre-existing right in the property i.e. it is a *jus ad rem not jus in rem*, sub-section (2) of Section 14 will not apply. Therefore when and where the female Hindu has a pre-existing right in property the limited right so granted would automatically enlarge into an absolute right by virtue of sub-section (1) of Section 14 of the Act. The restriction and limited estate granted by the document etc would have to be ignored. Thus, existence or absence of a pre-existing right of the female Hindu is the determinative check and test which answers the conundrum whether section 14 (1) or section 14 (2) would apply in a given case. The Explanation has been couched in the widest possible terms and must be liberally construed in favour of the female Hindus so as to advance the object of the Act and to promote the socio-economic ends.

7. To this extent there is no dispute on understanding the difference between sub-section (1) and (2) of section 14 of the Act. However there is a variance and divergent opinion on how the "pre-existing right" of a Hindu female can be established under sub-section (1) of section 14 to exclude the operation of sub-section (2) of section 14 of the Act. This difference of opinion stems from the right of maintenance given under the Hindu law to a female Hindu which is recognised and accepted since time immemorial. The right of maintenance flows from the social and temporal relationship between the husband and the wife. Way back in 1977 in *V . Tulasamma and Ors. Vs. Sessa Reddy* (1977) 3 SCC 99, the three-Judge Bench of the

Supreme Court had elucidated on the right of a female Hindu to maintenance and held it to be a pre-existing right, and with reference to Section 14 of the Act had observed:

“20. Thus on a careful consideration and detailed analysis of the authorities mentioned above and the Shastric Hindu Law on the subject, the following propositions emerge with respect to the incidents and characteristics of a Hindu woman's right to maintenance:

‘(1) that a Hindu woman's right to maintenance is a personal obligation so far as the husband is concerned, and it is his duty to maintain her even if he has no property. If the husband has property then the right of the widow to maintenance becomes an equitable charge on his property and any person who succeeds to the property carries with it the legal obligation to maintain the widow;

(2) though the widow's right to maintenance is not a right to property but it is undoubtedly a pre-existing right in property i.e. it is a *jus ad rem not jus in rem* and it can be enforced by the widow who can get a charge created for her maintenance on the property either by an agreement or by obtaining a decree from the civil court;

(3) that the right of maintenance is a matter of moment and is of such importance that even if the joint property is sold and the purchaser has notice of the widow's right to maintenance, the purchaser is legally bound to provide for her maintenance;

(4) that the right to maintenance is undoubtedly a pre-existing right which existed in the Hindu law long before the passing of the 1937 Act or the 1946 Act, and is, therefore, a pre-existing right;

(5) that the right to maintenance flows from the social and temporal relationship between the husband and the wife by virtue of which the wife becomes a sort of co-owner in the property of her husband, though her co-ownership is of a subordinate nature; and

(6) that where a Hindu widow is in possession of the property of her husband, she is entitled to retain the possession in lieu of her maintenance unless the person who succeeds to the property or purchases the same is in a position to make due arrangements for her maintenance.

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“62. We would now like to summarise the legal conclusions which we have reached after an exhaustive considerations of the authorities mentioned above on the question of law involved in this appeal as to the interpretation of Sections 14(1) and (2) of the 1956 Act. These conclusions may be stated thus:

‘(1) The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by pure Shastric Hindu Law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognising such a right does not confer any new title but merely endorses or confirms the pre-existing rights.

(2) Section 14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in favour of the females so as to advance the object of the 1956 Act and promote the socio-economic ends sought to be achieved by this long-needed legislation.

(3) Sub-section (2) of Section 14 is in the nature of a proviso and has a field of its own without interfering with the operation of Section 14(1) materially. The proviso should not be construed in a

manner so as to destroy the effect of the main provision or the protection granted by Section 14(1) or in a way so as to become totally inconsistent with the main provision.

(4) Sub-section (2) of Section 14 applies to instruments, decrees, awards, gifts, etc. which create independent and new titles in favour of the females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise pre-existing rights. In such cases a restricted estate in favour of a female is legally permissible and Section 14(1) will not operate in this sphere. Where, however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of Section 14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus, where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of sub-section (2) and would be governed by Section 14(1) despite any restrictions placed on the powers of the transferee.

(5) The use of express terms like 'property acquired by a female Hindu at a partition', 'or in lieu of maintenance', 'or arrears of maintenance', etc. in the Explanation to Section 14(1) clearly makes sub-section (2) inapplicable to these categories which have been expressly excepted from the operation of sub-section (2).

(6) The words 'possessed by' used by the legislature in Section 14(1) are of the widest possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same. Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property would be deemed to be possessed by her and by force of Section 14(1) she would get absolute interest in the property. It is equally well settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the section does not contemplate the possession of any rank trespasser without any right or title.

(7) That the words ‘restricted estate’ used in Section 14(2) are wider than limited interest as indicated in Section 14(1) and they include not only limited interest, but also any other kind of limitation that may be placed on the transferee.”

8. Similar view was taken in case of *Nazar Singh Vs. Jagjit Kaur* (1996) 1 SCC 35 in which it has been observed that:-

“9. Section 14 and the respective scope and ambit of sub-sections (1) and (2) has been the subject-matter of a number of decisions of this Court, the most important of which is the decision in *V. Tulasamma v. Sesha Reddy* [*V. Tulasamma v. Sesha Reddy*, (1977) 3 SCC 99 : AIR 1977 SC 1944] . The principles enunciated in this decision have been reiterated in a number of decisions later but have never been departed from. According to this decision, sub-section (2) is confined to cases where property is acquired by a female Hindu for the first time as a grant without any pre-existing right under a gift, will, instrument, decree, order or award, the terms of which prescribe a restricted estate in the property. It has also been held that where the property is acquired by a Hindu female in lieu of right of maintenance inter alia, it is in virtue of a pre-existing right and such an acquisition would not be within the scope and ambit of sub-section (2) even if the instrument, decree, order or award allotting the property to her prescribes a restricted estate in the property. Applying this principle, it must be held that the suit lands, which were given to Harmel Kaur by Gurdial Singh in lieu of her maintenance, were held by Harmel Kaur as full owner thereof and not as a limited owner notwithstanding the several restrictive covenants accompanying the grant. [Also see the recent decision of this Court in *Mangat Mal v. Punni Devi* [*Mangat Mal v. Punni Devi*, (1995) 6 SCC 88] where a right to residence in a house property was held to attract sub-section (1) of Section 14 notwithstanding the fact that the grant expressly conferred only a limited estate upon her.] According to sub-section (1), where any property is given to a female Hindu in lieu of her maintenance before the commencement of the Hindu Succession Act, such property becomes the absolute property of such female Hindu on the

commencement of the Act provided the said property was 'possessed' by her. *Where, however, the property is given to a female Hindu towards her maintenance after the commencement of the Act, she becomes the absolute owner thereof the moment she is placed in possession of the said property (unless, of course, she is already in possession) notwithstanding the limitations and restrictions contained in the instrument, grant or award whereunder the property is given to her.* This proposition follows from the words in sub-section (1), which insofar as is relevant read: 'Any property possessed by a female Hindu ... after the commencement of this Act shall be held by her as full owner and not as a limited owner'. In other words, though the instrument, grant, award or deed creates a limited estate or a restricted estate, as the case may be, it stands transformed into an absolute estate provided such property is given to a female Hindu in lieu of maintenance and is placed in her possession. So far as the expression 'possessed' is concerned, it too has been the subject-matter of interpretation by several decisions of this Court to which it is not necessary to refer for the purpose of this case."

9. Following this view it has also been observed that reference to right to maintenance need not be specifically stated and written in the Will for the said right already exists. In *Balwant Kaur and Anr. Vs. Chanan Singh & Ors.*, (2000) 6 SCC 310, it was observed:-

"As we have already seen earlier, if the testator had died intestate, instead of 1/3rd interest she would have got full interest, in the suit land and it is that interest which was curtailed up to 1/3rd in lieu of her claim for maintenance against the estate of the testator pursuant to the will in question. It, therefore, cannot be said that the provision in the will in her favour was not in lieu of a pre-existing right and was conferred only for the first time under the will so as to attract [Section 14\(2\)](#) of the Succession Act as, with respect, wrongly assumed by the High Court."

Reference can also be made to earlier decisions in *Jaswant Kaur Vs. Major Harpal Singh*, (1989) 3 SCC 572, and *Gulwant Kaur Vs. Mohinder Singh*,

(1987) 3 SCC, 674, on the question of antecedent right and acquisition traceable to it, to hold that in such cases sub-section (1) of Section 14 and not sub-section (2) would be applicable. In the case of *Thota Shesharathamma Vs. Thota Manikyamma* (1991) 4 SCC 312, a clear, categorical, and binding dictum is found in the following words:-

“There need be no express recital even in the will of the enjoyment of the property devised under the will in lieu of maintenance as a limited owner for her life. Even if so mentioned, it would be a reflection or restatement of the law existing as in 1932 when the will was executed. The respondent, admittedly, being a widow of the testator who, under Shastric law was obligated to provide maintenance of his wife, and it being personal obligation, the property bequeathed was in lieu of maintenance for her life. She was in enjoyment of the property and beneficial interest therein stood vested in her.”

10. On the other hand we have the judgement of Supreme Court in *Mst. Karmi Vs. Amru and Ors.*, (1972) 4 SCC 86, which appears to be at variance with the aforesaid view. Decision and ratio of *Karmi* (supra) is also voiced in *Sadhu Singh Vs. Gurdwara Sahi Narike*, (2006) 8 SCC 75, and then in *Shivdev Kaur Vs. R.S. Grewal*, (2013) 4 SCC 636. The last decision observes as under:

"14. Thus, in view of the above, the law on the issue can be summarised to the effect that if a Hindu female has been given only a “life interest”, through will or gift or any other document referred to in Section 14 of the 1956 Act, the said rights would not stand crystallised into absolute ownership as interpreting the provisions to the effect that she would acquire absolute ownership/title into the property by virtue of the provisions of Section 14(1) of the 1956 Act, the provisions of Sections 14(2) and 30 of the 1956 Act would become otiose. Section 14(2) carves out an exception to the rule provided in sub-section (1)

thereof, which clearly provides that if a property has been acquired by a Hindu female by a will or gift, giving her only a "life interest", it would remain the same even after commencement of the 1956 Act, and such a Hindu female cannot acquire absolute title."

11. We need not debate on the said divergence for the decision in *Karmi* (supra) was referred to and commented upon in *Thota Shesharathamma* (supra) in the following words:

"10. The case of *Mst Karmi v. Amru* [(1972) 4 SCC 86 : AIR 1971 SC 745] on which a reliance has now been placed by learned counsel for the appellant and petitioners was also decided by a bench of three Judges Hon. J.C. Shah, K.S. Hegde and A.N. Grover, JJ. It may be noted that two Hon'ble Judges, namely, J.C. Shah and A.N. Grover were common to both the cases. In *Mst Karmi v. Amru* [(1972) 4 SCC 86 : AIR 1971 SC 745] , one Jaimal died in 1938 leaving his wife Nihali. His son Ditta predeceased him. Appellant in the above case was the daughter of Ditta and the respondents were collaterals of Jaimal. Jaimal first executed a will dated December 18, 1935 and by a subsequent will dated November 13, 1937 revoked the first will. By the second will a life estate was given to Nihali and thereafter the property was made to devolve on Bhagtu and Amru collaterals. On the death of Jaimal in 1938, properties were mutated in the name of Nihali. Nihali died in 1960/61. The appellant Mst Karmi claimed right on the basis of a will dated April 25, 1958 executed by Nihali in her favour. It was held that the life estate given to a widow under the will of her husband cannot become an absolute estate under the provisions of the Hindu Succession Act. Thereafter, the appellant cannot claim title to the properties on the basis of the will executed by the widow Nihali in her favour. It is a short judgment without adverting to any provisions of Section 14(1) or 14(2) of the Act. The judgment neither makes any mention of any argument raised in this regard nor there is any mention of the earlier decision in *Badri Pershad v. Smt Kanso Devi* [(1969) 2 SCC 586 : (1970) 2 SCR 95 : AIR 1970 SC 963] . The decision in *Mst Karmi* [(1972) 4 SCC 86 : AIR 1971 SC 745]

cannot be considered as an authority on the ambit and scope of Section 14(1) and (2) of the Act.”

12. The decision in *Karmi* (supra), *Sadhu Singh* (supra), *Shiv Dev Kaur* (supra), and other set of decisions expressing the contra view were referred to and considered in *Jupudy Pardha Sarathy Vs. Pentapati Ram Krishna and Ors.*, (2016) 2 SCC 56. The Supreme Court preferred to follow the dictum pronounced in the case of *V. Tulsamma* (supra). On the respect of antecedent right in *Jupudy Pardha Sarathy* (supra) it has been observed:-

“30. Mr Viswanathan, learned Senior Counsel for the appellant's last contention was that in the absence of any pleading and proof from the side of the appellant to substantiate the plea that Veeraraghavamma was occupying the property in lieu of maintenance, Section 14 will not be automatically attracted. We do not find any substance in the submission made by the learned counsel. Indisputably, Ext. A-2 is a document which very categorically provided that the property in question was given to Veeraraghavamma to enjoy the same till her life. Neither the genuineness of the said Ext. A-2 was disputed nor was it disputed that Veeraraghavamma was enjoying the property by way of maintenance. In our considered opinion, unless the factum of bequeathing the property in favour of the wife and her continuous possession are disputed, the question of pleading and proof does not arise. In other words, no one disputed the arrangement made in the will and Veeraraghavamma continued to enjoy the said property in lieu of maintenance. Hence, the ratio decided in *G. Rama case*[*G. Rama v. T.G. Seshagiri Rao*, (2008) 12 SCC 392] does not apply.

31. x x x x

32. x x x x

33. Though no specific word has been mentioned in Ext. A-2 that in lieu of maintenance life interest has been created in favour of Veeraraghavamma, in our opinion in whatever form a limited interest is created in her favour who was having a pre-existing right of maintenance, the same has become an absolute right by the operation of Section 14(1) of the Hindu Succession Act.”

13. The last judgement which refers to the earlier decisions would in our opinion is the binding precedent and we cannot therefore refer to and rely upon the ratio in *Karmi* (supra), *Sadhu Singh* (supra), and *Shiv Dev Kaur* (supra). We have referred to the said decisions as we find that in the present case the appellant had not claimed and pleaded pre-existing right of Shanti Devi Jain, who had acquired rights in the property under clause (a) of the Will of late Ratan Lal Jain. The Will of late Ratan Lal Jain is also silent. However, in view of law laid down in *Jupudy Pardha Sarathy* (supra), such pre-existing right, in terms of sub-section (1) of section 14 of the Act, would have made late Shanti Devi Jain the absolute owner of the said property. In these circumstances we do not think that the Single Judge was right in allowing the application under Order XII, Rule 6 of the Code and passing the preliminary decree, defining the shares of the parties as 1/4th each.

14. The preliminary decree in the present case cannot be passed without there being adjudication and decision in Test Case No.86 of 2011 which relates to the purported Will of Shanti Devi Jain. The preliminary decree of partition passed is accordingly set aside. We would also clarify that notwithstanding the present order, if there is a change and declaration of law by the Supreme Court which is at variance to the view/ratio expressed above, before the final pronouncement and decision by the Single Judge on remand, the same would be considered and applied.

15. With aforesaid observations, we allow the present appeal and set aside the impugned order allowing I.A. No.11910/2014 and the preliminary decree passed in CS (OS) 2370/2013. No Costs. List before the Single Judge on 28.8.2017 .

(SANJIV KHANNA)
JUDGE

(NAVIN CHAWLA)
JUDGE

JULY 31st, 2017
NA/ssn

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