N. K. S.

Before G. C. Mittal, J.

SHANTI AND OTHERS,—*Appellants.*

versus

SMT. BHAGWANI AND OTHERS,—*Respondents.*

Regular Second Appeal No. 472 *of* 1983.

February 14, 1984.

Indian Succession Act (XXXIX of 1925—*Sections* 107 & 109—*Bequest in favour of two sons of the testator—One of the legatees dies in the life time of the testator—Request in favour of such legatee—Whether to be inherited by his heirs on the death of the testator—Words 'any child' in section* 109—*Whether mean one child only or children also.*

Held, that when the testator specifically excludes some of his children and wants his estate to go to the remaining children, then what he really means that it should go to them and in case any one of them predeceases him then it should go to the heirs of the predeceased child and precisely for that matter provision was made

in section 109 of the Indian Succession Act, 1925 that such pre-deceased child by fiction of law shall be deemed to have died immediately after the death of the testator so that the heirs of the predeceased child get the benefit of the testament and *qua* his share it should not lapse. The exclusion of some of the children from inheritance goes to show that the testator never intended that any part of his estate should go to them and if section 109 of the Act is not applied then the legacy made to predeceased child will revert back to the testator and all his children will share the same. The result would be that the children whom he never wanted to succeed would succeed to some share. To avoid this result, to flow, Section 109 of the Act clearly provided that whenever testament is made in favour of any child or other lineal descendants, their heirs should succeed if they predecease the testator on the fiction that the death of the child took place soon after the death of the testator.

(Para 10).

Regular Second Appeal from the decree of the Court of Shri A. P. Chaudhry, District Judge, Rohtak, dated the 22nd day of November, 1982, affirming with costs that of Shri G. L. Goyal, Sub Judge Ist Class, Jhajjar, dated the 4th day of August, 1982, dismissing the suit of the plaintiffs leaving the parties to bear their own costs.

P. S. Jain, Senior Advocate with S. K. Jain, Advocate *for the Appellant.*

U. D. Gaur, Advocate, R. S. Chahar, Advocate, *for Respondent No.* 3.

JUDGMENT

Gokal Chand Mittal, J.

(1) Whether the words 'any child' used in Section 109 of the Indian Succession Act, 1925 means "one child only" or it can mean "children" also, as the case may be, is the main point involved in this second appeal.

(2) Raghunath had a wife, two sons and five daughters. He executed a will in favour of his sons Ishwar and Ram Kishan. Ram Kishan predeceased his father leaving his widow and a daughter. In 1977 Raghunath died. The widow, four daughters and children of 5th daughter of Raghunath filed the present suit to claim succession to the half share of the estate on the basis that since Ram Kishan legatee pre-deceased the testator that half share reverted to the estate of Raghunath under Section 107 of the Indian

Succession Act, 1925 (hereinafter referred to as 'the Act'), and, therefore, they were entitled to share in that half share in accordance with the Hindu Succession Act, 1956. The widow and daughter of Ram Kishan contested the suit and pleaded that Section 109 of the Act was applicable and not Section 107 of the Act. On this basis it was pleaded by them that the bequest made to Ram Kishan did not lapse and by fiction of law the same took effect as if the death of legatee happened immediately after the death of the testator. The plea of the defendants prevailed with both the Courts below and consequently the suit was dismissed. This is plaintiffs' second appeal.

(3) Shri P. S. Jain, Senior Advocate, appearing on behalf of the plaintiffs argued that Section 109 of the Act would apply only when bequest is made to a child or other lineal descendant of the testator, and in case bequest is made to two children or to two lineal descendants then Section 109 of the Act would not come into play and only Section 107 of the Act would be applicable. Unless legacy was made jointly in which case Section 106 of the Act would come into play. On this basis it is argued that Section 107 of the Act was applicable and since one of the legatees predeceased the testator so the share of that legatee would fall under the residue of the testator's property and succession had to be considered under the Hindu Succession Act, 1956.

(4) Controverting the argument, Shri U. D. Gaur, Advocate argued that Section 109 of the Act is an exception to Sections 105 to 108 of the Act, inasmuch as Section 109 of the Act would apply whenever a testament is made in favour of any child or children of the testator or lineal descendant or descendants of the testator or both of them, whereas in case the legatees are other than the child or lineal descendants of the testator, then provisions of Sections 105 to 108 of the Act would apply. He further urged that in interpreting Section 109 of the Act singular would include plural on the basis of the provision contained in general Clauses Act unless the intention to the contrary is found in the section, which is not there. He further contended that the word 'any child' clearly indicates that the testament should not be to any one of the children but to 'any child', meaning thereby it may be to more than one child or to all the children.

(5) After hearing the learned counsel for the parties, I am of the view that the Courts below correctly applied Section 109 of the Act to the facts of the present case.

(6) *Smt. Gita Devi* vs. *Smt. Munder Devi*, (1) is the only reported judgment which has been brought to my notice on the point involved in this appeal. In this case the will was made in favour of two daughters, one of whom pre-deceased the testator but left an-issue. On those facts it was held by Banerji, J. that Section 109 of the Act was applicable and not Section 107 of the Act and by fiction of law it was deemed that the daughter died immediately after the death of the testator and in this manner the bequest regarding the daughter who pre-deceased her father was not allowed to lapse and the benefit of the same was given to the descendants of the pre-deceased daughter. The reasons for doing so are contained in paras 15 to 18 of the judgment with which I agree. The additional reason for arriving at the same conclusion are as follows.

(7) The natural succession to males is governed by Section 8 of the Hindu Succession Act, 1956 read with schedule and class-I heirs include son, daughter, widow, mother; children of predeceased son; children of pre-deceased daughter, widow of a pre-deceased son and so on. This shows that if a son or daughter pre-deceases the father, under the natural succession, the share of the pre-deceased son or the daughter, as the case may be, goes to their children. Therefore, the child or line of the child gets equal share under the natural succession. Similar provision is contained in Section 15(1)(a) of the very Act when succession is to a female. The children of the pre-deceased son or daughter of such a female get due share of their father or mother alongwith live children of the female. Section 109 of the Act was enacted to carry forward the same rule of succession, whenever will was executed in favour of any child or other lineal descendants and this is clearly an exception to the general provisions of Sections 105 to 108 of the Act.

(8) For example if the testator executes a will in favour of all of his children, who were alive at the time of execution of the will but one or more of them died during his life time and if Section 109 of the Act was not to be applied and Section 107 of the Act was to be applied, the resultant effect would be that the line of the pre-deceased child or children would stand excluded in getting equal representation in the estate of the deceased, in spite of the fact that the testator wanted to give equal share to each one of his children. But if Section 109 of the Act is applied then each line will get equal share. The same result, will flow in case the

(1) A.I.R. 1980 All. 372.

testator had not executed any will. To my mind Parliament wanted the same result to flow in case of natural succession and the testamentary succession.

(9) If in a given case the testator has two children, A and B. On one day he executes a will by which he devises half of his estate in favour of 'A' and for the remaining he makes no provision in the will. Sometime thereafter he executes another will. In that will he notices the execution of the earlier will and maintains that will and adds that the remaining half of his estate would go to his other child 'B'. Both A and B have children. After the execution of the two wills, 'A' dies. The counsel for the appellants fairly conceded that since under the first will there was bequest to one child that will would still be operative in favour of the lineal descendants of 'A' in view of Section 109 of the Act. This he conceded on the premises that it was a case of one will and one child was the legatee. However, he did not agree that if by one and the same will equal estate was devised in favour of 'A' and 'B'., then Section 109 of the Act would apply but stated that Section 107 of the Act would apply. However, I am not able to find out any distinction in the two situations, nor Parliament wanted to make any distinction that different results should flow under the two situations. If Section 109 of the Act was not to be applied to a case of one will in favour of both the children then in that case the son who did not predecease his father would get half share under the will and another half out of the remaining half on the basis of natural succession i.e. 3/4th out of the estate of his father and the line of pre-deceased son would get 1/4th share. I am of the considered view that Parliament really meant that one result should flow whenever the testament was in favour of 'any child' or other lineal descendants. It could never intend that un-reasonable result of one line getting 3/4th share and the other line getting 1/4th share should flow.

(10) To me it appears that the word 'any child' includes plural also. Section 109 of the Act was specifically framed, whenever will was in favour of a child or children of the testator or in favour of other lineal descendant or descendants of the testator, whereas Sections 105 to 108 of the Act were applicable regarding testaments to persons other than children and other lineal descendants. In Sections 105 to 108 of the Act all provisions have been made and those were not necessary to be provided in case of one's own children or grand children. To illustrate, assuming a person has more than two children, but he intends to devise his estate in favour

of only some of them, may be one or two. It is not disputed that in case the will was in favour of only one of them and in case he or she pre-deceases the father, then his or her children will get the benefit of the will in view of Section 109 of the Act. To my mind, this very result was to flow even if the will was in favour of two of the children or more but not all the children. Regarding the will in favour of all the children the matter has been discussed above. Here where the will is in favour of not all but some, then it has to be seen as to what result should flow. When the testator specifically includes some of his children and wants his estate to go to the remaining children, then what he really means is that it should go to them and in case of any one of them predeceases him then it should go to the heirs of the predeceased child and precisely for that matter provision was made in Section 109 of the Act that such predeceased child by fiction of law shall be deemed to have died immediately after the death of the testator so that the heirs of the predeceased child get the benefit of the testament and *qua* his share it should not lapse. The exclusion of some of the children from inheritance goes to show that the testator never intended that any part of his estate should go to them and if Section 109 of the Act is not applied then the legacy made to predeceased child will revert back to the testator and all his children will share the same. The result would be that the children whom he never wanted to succeed would succeed to some share. To avoid this result to flow, Section 109 of the Act clearly provided that whenever testament is made in favour of any child or other lineal descendants, their heirs should succeed if they predecease the testator on the fiction that the death of the child took place soon after the death of the testator.

(11) For all the aforesaid reasons I hold that Section 109 of the Act is applicable to this case and it has to be deemed that Ram Kishan's death happened immediately after the death of Raghunath testator with the result that will in favour of Ram Kishan did not lapse and survived in favour of his widow and child who are defendants in this case and the plaintiffs cannot claim any share therein.

(1) For the reasons recorded above, this appeal is devoid of merit and is dismissed. Since important question of law was involved, the parties are left to bear their own costs.

N.K.S.