

Reserved on 25.07.2019

Delivered on 30.08.2019

A.F.R

Court No. - 52

Case :- SECOND APPEAL No. - 121 of 2002

Appellant :- Shri Ram Krishna Puri

Respondent :- Smt. Gurpyari Devi And Others

Counsel for Appellant :- Some Narayan Mishra, S.N. Mishra

Counsel for Respondent :- Smt. Usha Kiran, Abhijeet Mukherji, Mamta Singh, N.K. Srivastava, Pratima Srivastava, S.K. Mehrotra, Sri B.K. Shukla

Hon'ble Harsh Kumar, J.

The instant appeal has been filed against judgment and decree dated 18.1.2002 passed by Additional District Judge, Kanpur Nagar in Civil Appeal No.264 of 2001 arising out of judgment and decree dated 4.9.2001 passed by Additional Civil Judge (Senior Division), Kanpur Nagar in Civil Suit No.193 of 1986.

The brief facts relating to the case are that Shri Ram Krishna Puri filed Civil Suit No.193 of 1986 in the Court of Civil Judge, Kanpur Nagar against Smt. Gurpyari Devi, Sri Kashi Nath Khatri and Allahabad Bank for a decree of declaration to the effect that plaintiff is entitled to the amount due under the four fixed deposit receipts each for Rs.10,000/- dated 16.1.1981 for a period of 63 months and plaintiff be awarded cost of suit against defendant-respondent nos.1 and 2, with the averments that Smt. Sahodara @ Sahodara Bibi had brought up plaintiff as his mother had died during his infancy and that she held four fixed deposit receipts each for Rs.10,000/- dated 16.1.1981 for a period of 63 months and was sole owner of the amount and had got name of defendant no.1 Gurpyari Devi added along with her in the fixed deposit receipts with the remark “Payable to the former or Survivor”; and since Smt. Sahodara died on 30.1.1985 after executing her last will dated 18.1.1983 in favour of

plaintiff in respect of impugned fixed deposit receipts and defendant no.1 is disputing the rights of plaintiff, hence suit.

The defendant no.1 filed a written statement denying the allegations of plaintiff and claiming herself to be entitled to full and final payment of maturity amount under the impugned fixed deposit receipts and that the suit is barred by provisions of Section 213 of Indian Succession Act.

Defendant no.2 also filed separate written statement denying the allegations of plaintiff.

On parties pleadings the trial court framed as many as six issues viz.,

(i) Whether Smt. Sahodara executed a will deed dated 18.1.1983?

(ii) What if any is the effect of entries of the name of Smt. Gurpyari Devi and Smt. Sahodara over the fixed deposit receipts?

(iii) Whether Smt. Sahodara had a right to execute will deed in respect of fixed deposit receipts?

(iv) Whether the suit is barred by provisions of Section 213 of Indian Succession Act?

(v) Whether suit is under valued and court fee paid is insufficient?

(vi) To what relief if any, is the plaintiff entitled?

After recording parties evidence and hearing arguments, the learned trial court held that plaintiff has succeeded in proving execution of will deed dated 18.1.1983 by Smt. Sahodara and decided issue no.1 in favour of plaintiff. On issue nos.2 and 3 trial court gave a finding in favour of plaintiff against the defendant and also decided issue no.4 in favour of plaintiff and against defendant while issue no.5 had been previously decided on 10.9.1991 against defendant. In view of above findings on issue no.6 trial court held that plaintiff has succeeded in proving his case and decreed the suit vide judgment and decree dated 4.9.2001.

Feeling aggrieved defendant no.1 Smt. Gurpyari Devi preferred Civil Appeal No.264 of 2001 before District Judge, Kanpur Nagar which was transferred for disposal to the court of Additional District Judge, Court No.8, Kanpur Nagar. The lower appellate court vide impugned judgment and decree dated 18.1.2002 allowed appeal and set aside the judgment and decree passed by trial court in Civil Suit No.193 of 1986 dismissing the suit of plaintiff.

Feeling aggrieved the plaintiff has preferred instant second appeal.

The instant second appeal has been admitted vide order dated 8.2.2002 on following two substantial questions of law :-

(1) Whether the first appellate court has erred in dismissing the suit on the ground that the suit for declaration is not maintainable?

(2) Whether the first appellate court has erred in carving out a new case itself regarding the maintainability of the suit?

Heard Shri Some Narayan Mishra, learned counsel for plaintiff-appellant hereinafter referred as plaintiff and Shri Abhijeet Mukherji, learned counsel for defendant-respondent no.1 hereinafter referred as defendant and perused the record as well as lower court record summoned in this second appeal.

Learned counsel for plaintiff contends that judgment and decree passed by lower appellate court is bad on facts and law; that lower appellate court acted wrongly in allowing the appeal without displacing the findings recorded by trial court in favour of plaintiff-appellant; that trial court acted wrongly in holding that suit was barred by provisions of Section 213 of Indian Succession Act; that impugned fixed deposit receipts were obtained by Smt. Sahodara which were issued in the name of Smt. Sahodara and Smt. Gurpyari Devi with the endorsement by bank on top of it mentioning "Payable to Former or Survivor"; that

undisputedly Smt. Sahodara died on 30.1.1985; that since Smt. Sahodara had executed a registered will dated 18.1.1983 in favour of plaintiff-appellant, in respect of the fixed deposit receipts in question, the plaintiff-appellant has a right to get the maturity amount mentioned in the fixed deposit receipts; that survivor Smt. Gurpyari Devi has no right or title over the amount mentioned in fixed deposit receipts and her position will be that of nominee only; that nominee can only receive payment from bank but may not change the rights of successors rather will be bound to make payment of amount so received to the successors of deceased; that since the plaintiff-appellant was legatee of the will deed executed by Smt. Sahodara she was rightful owner of maturity amount under the impugned fixed deposit receipts; that the findings of trial court on issue no.1 with regard to execution of registered will dated 18.1.1983 by Smt. Sahodara in favour of plaintiff-appellant has not been set aside by lower appellate court and without setting aside the findings of trial court, the impugned judgment and decree allowing the appeal and setting aside the judgment and decree of trial court is absolutely wrong, illegal and against law; that lower appellate court has erred in dismissing the suit on the ground that suit for declaration is not maintainable; that lower appellate court had no jurisdiction in carving out a new case itself regarding maintainability of suit while there was no such plea taken by defendant-respondent; that the impugned judgment and decree are liable to be set aside and the judgment and decree passed by trial court are liable to be restored.

Per contra learned counsel for defendant-respondent no.1 supported the impugned judgment and decree passed by lower appellate court and contended that learned trial court acted wrongly and illegally in decreeing the suit of plaintiff-appellant and lower appellate court very rightly held the suit to be barred by provisions of Section 213 of Indian Succession Act and in the alternative by provisions of Section 372 of Indian Succession Act; that the suit for seeking a declaratory decree for declaration of his rights to receive the payment under the disputed fixed

deposit receipts is virtually a relief for seeking mandatory injunction, directing the bank to make payment of maturity amount under the impugned fixed deposit receipts; that upon death of Smt. Sahodara, her niece defendant-respondent no.1 Smt. Gurpyare Devi became exclusive and rightful owner and to get payment under the impugned fixed deposit receipts being mentioned as survivor in the fixed deposit receipts; that no substantial question of law is involved in this appeal and appeal is liable to be dismissed with costs.

Upon hearing parties counsel and perusal of record as well as record of lower court summoned in appeal, I find that undisputedly Smt. Sahodara Bibi obtained four fixed deposit receipts (hereinafter referred to as 'FDRs') for Rs.10,000/- each on 16.1.1981 from Allahabad Bank for a period of 63 months, which were issued by Allahabad Bank in the name of Smt. Sahodara and Smt. Gurpyari Devi (hereinafter referred to as 'S' & 'G', respectively) with mandate of mode of payment as "Payable to Former or Survivor". 'S' died on 30.1.1985 and Ram Krishna Puri (hereinafter referred to as 'R') filed Civil Suit No.193 of 1986 claiming to be a legatee under the last Will executed and registered by 'S' in his favour on 18.1.1983 and sought a declaratory decree, seeking declaration that he is entitled to get the amount due under four FDRs detailed in prayer clause, impleading Allahabad Bank as Defendant No.3, who did not file any written statement and did not contest the suit. The Trial Court holding that plaintiff has succeeded in proving the Will as well as his case, decreed the suit, against which Civil Appeal No.264 of 2001 filed by defendant 'G' was allowed by lower Appellate Court and plaintiff 'R' has preferred instant second appeal.

The lower Appellate Court has framed two points for determination of appeal (i) who is legally entitled to get amount under the impugned FDRs and whether in view of the mandate mentioned over the FDRs 'S' had a right to execute Will in respect of the amount mentioned in FDRs and (ii) whether suit was barred by provisions of Section 213 of Indian

Succession Act.

On point no.1, the lower Appellate Court held that in view of the mandate of “Payable to Former or Survivor”, upon death of ‘S’ only ‘G’ was entitled to operate the account or receive the amount payable under the impugned FDRs and the Trial Court has committed mistake of facts and law in not considering the wordings of mandate mentioned over all the impugned FDRs. It further held that in the circumstances, question of execution and proof of Will deed dated 18.1.1983 lost its relevance, because the survivor ‘G’ was exclusively entitled to get the amount under impugned FDRs and legal heirs or the legatee of ‘S’, under impugned Will deed dated 18.1.1983 may not be getting any legal right to receive the amount of impugned FDRs. On point no.2 it held that though ‘R’ claims execution of Will by ‘S’ in his favour, but since he did not obtain Probate or Succession Certificate, the suit was barred by provisions of Section 213 of Indian Succession Act and in view of mandate mentioned over FDRs as well as provisions of Section 42 of Specific Relief Act, the Civil Court had no jurisdiction to try suit and pass declaratory decree in respect of money under impugned FDRs.

Substantial question of law No.1 is as under :-

“(1) Whether the first appellate court has erred in dismissing the suit on the ground that the suit for declaration is not maintainable?”

The substantial question of law No.1 relating to maintainability of suit for declaration has been dealt with by lower Appellate Court under point No.2 framed by it. It is pertinent to mention that Section 42 of Specific Relief Act, 1963 has no application to the case and suits for declaration. Specific Relief Act, 1877 was replaced by new Specific Relief Act, 1963, which came into force w.e.f. 13th January, 1964, Section 42 of which deals with provisions relating to “Injunction to perform negative agreement”. Section 34 of Specific Relief Act, 1963 which is equivalent to Section 42 of old Specific Relief Act, 1877 with certain

changes, contains provisions with regard to Declaratory decrees and discretion of Court, as to declaration of status or right. In the instant case, undisputedly the amount under the impugned FDRs has not been paid by Bank to 'G', the survivor, and suit seeking decree for declaration about his entitlement only, was competent without seeking any further relief. Hence the Court finds that lower Appellate Court acted wrongly and illegally in holding the suit to be barred by provisions of Section 42 of Specific Relief Act, without even considering the repeal of old Act of 1877 and provisions of Sections 34 and 42 of new Act.

As far as provisions of Sections 213 and 372 of Indian Successions Act with regard to Probate and Succession certificate are concerned, in view of the law laid down by Division Bench of this Court in the case of ***Smt. Bimla Gaindhar Vs. Smt. Usha Gaindhar and another, AIR 2004 Ald 329***, and provisions of Section 57 of the Act, plaintiff 'R' was not at all required to obtain a Probate on the basis of Will deed dated 18.1.1983 executed by 'S'.

In above case, it was also held that though probate will not be required in such cases, but an application under Section 372 of the Act would be maintainable. It is noteworthy that mere availability of remedy of an application (miscellaneous proceedings) under Section 372 of Indian Succession Act, does not bar jurisdiction of Civil Courts to entertain regular civil suit for declaration.

In view of discussions made above, this Court is of considered view that lower Appellate Court committed manifest error of law and acted wrongly and illegally in allowing appeal and dismissing the suit of plaintiff on the ground of non maintainability of suit in view of provisions of Section 42 of Specific Relief Act or in view of provisions of Sections 372 or 213 of Indian Succession Act. Substantial question of law No.1 is accordingly decided in affirmative in favour of plaintiff against the appellant.

The substantial question of law no.2 is as under:-

“(2) Whether the first appellate court has erred in carving out a new case itself regarding the maintainability of the suit?”

The matter relating to this substantial question of law has been discussed by lower Appellate Court under point no.1 framed by it and in paras 7 to 11 of the impugned judgment observing that on all impugned FDRs, mandate “Payable to Former or Survivor” is mentioned. Considering the meaning and effect of above mandate regarding mode of payment, by giving an example, it held that where an account is in the names of ‘A’ and ‘B’ with mandate of Former or Survivor, ‘A’ holds right to operate the account throughout his life time and after his death, right to operate account goes to ‘B’ but ‘B’ has no right to operate the account during life time of ‘A’, and in case ‘B’ dies in life time of ‘A’, the legal heirs of ‘B’ will not be entitled to operate the account or receive the amount and so only upon death of ‘A’, ‘B’ may be entitled to operate the account and receive the amount in which case legal heirs or legatee of ‘A’, will not have any legal right to operate the account or receive the amount.

It was contended by plaintiff that lower Appellate Court acted wrongly and illegally in ignoring the duly proved Will deed and in dismissing suit of plaintiff without displacing the findings of Trial Court on issue no.1 in favour of plaintiff ‘R’ regarding execution of Will deed dated 18.1.1983 by ‘S’ and committed manifest error in holding that in view of mandate “Payable to Former or Survivor”, the survivor ‘G’ acquired absolute rights of receiving the maturity amount to the exclusion of legal heirs or legatee of ‘S’. It was contended that being survivor, position of ‘G’ was only that of a nominee, who had a limited right, only to receive the amount under the impugned FDRs, as trustee of legal heirs of former ‘S’ deceased.

Now the main point to be considered is that, as to what will be the rights of ‘Survivor’ defendant ‘G’, in view of mandate of ‘Former or

Survivor' mentioned over the impugned FDRs, as mode of payment and whether the survivor will get absolute rights to get maturity value as claimed by defendant 'G' and held by lower Appellate Court, OR will get only limited rights to receive money as trustee of heirs of Former, like a nominee nominated by Former as claimed by plaintiff 'R', the legatee and legal heir of Former 'S'.

Before proceeding on this question, I find it expedient to reproduce the provisions of Section 45 of Indian Contract Act, 1872 and Section 45ZA of The Banking Law Regulation Act, 1949, which are as under:-

“Section 45 of Indian Contract Act, 1872.

45. Devolution of joint right. -When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with representatives of all jointly.

Illustration

A, in consideration of 5,000 rupees lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representatives jointly with C during C's life, and after the death of C, with the representatives of B and C jointly.

Section 45ZA of The Banking Law Regulation Act, 1949.

45ZA. Nomination for payment of depositors' money.-

(1) Where a deposit is held by a banking company to the credit of one or more persons, the depositor or, as the case may be, all the depositors together, may nominate, in the prescribed manner, one person to whom in the event of the death of the sole depositor or the death of all the depositors, the amount of deposit may be returned by the banking company.

(2) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether

testamentary or otherwise, in respect of such deposit, where a nomination made in the prescribed manner purports to confer on any person the right to receive the amount of deposit from the banking company, the nominee shall, on the death of the sole depositor or, as the case may be, on the death of all the depositors, become entitled to all the rights of the sole depositor or, as the case may be, of the depositors, in relation to such deposit to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

(3) Where the nominee is a minor, it shall be lawful for the depositor making the nomination to appoint in the prescribed manner any person to receive the amount of deposit in the event of his death during the minority of the nominee.

(4) Payment by a banking company in accordance with the provisions of this section shall constitute a full discharge to the banking company of its liability in respect of the deposit:

Provided that nothing contained in this sub-section shall affect the right or claim which any person may have against the person to whom any payment is made under this section.”

In the case of **Ram Chander Talwar Vs. Devendra Kumar Talwar and others, 2010 (10) SCC 671**, the Apex Court held that

Section 45ZA(2) merely puts the nominee in the shoes of the depositor after his death and clothes him with the exclusive right to receive the money lying in the account. It gives him all the rights of the depositor so far as the depositor's account is concerned. But it by no stretch of imagination makes the nominee the owner of the money lying in the account. It needs to be remembered that the Banking Regulation Act is enacted to consolidate and amend the law relating to banking. It is in no way concerned with the question of succession. All the monies receivable by the nominee by virtue of Section 45ZA(2) would, therefore, form part of the estate of the deceased depositor and devolve according to the rule of succession to which the depositor may be governed.”

In the case of **Smt. Sarabati Devi and another Vs. Smt. Usha Devi, 1984 SCC (1) 424**, the Apex Court interpreting the provisions of Section 39 of Insurance Act held that :-

“1.1 A mere nomination made under Section 39 of the Insurance Act, 1938 does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the assured. The nomination only indicates the hand which is authorised to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them.”

1.2 An analysis of the provisions of Section 39 of the Act clearly established that the policy holder continues to hold interest in the policy during his life time and the nominee acquires no sort of interest in the policy during the life time of the holder. If that is so, on the death of the policy holder the amount payable under the policy becomes part of his estate which is governed by the law of succession applicable to him, such succession may be testamentary or intestate. The tenuous character of the right of a nominee becomes more pronounced when one contrasts the provisions of Section 39 with that of Section 38.

Section 39 of the Act was not intended to act as a third mode of succession provided by the statute and incorrectly styled as “statutory testament” by the Delhi High Court.

1.3 The language of Section 39 of the Act is neither capable of altering the course of succession under law nor can be said to have equated a nominee to an heir or legatee.”

“**Modern Law Publications**” published an exhaustive commentary on Banking Law with new developing areas like MICR technology etc. under the name of “**Banking Law and Practice by R.K. Gupta**”, Joint Legal Advisor, Reserve Bank of India, Legal Department, Central Office, Mumbai, with a foreword by Hon’ble Mr. Justice G.P. Mathur, Judge Supreme Court in two volumes. In above commentary on “**Banking Law and Practice**”, Volume I published in the year 2012 in Chapter 7 at page 1.513 rights of survivor regarding joint accounts have been described as under :-

“Joint Account payable to former or survivor. - When the fixed deposit is payable to Former or Survivor, the deposit is payable to the former so long he is alive and after his death, the deposit is payable to the survivor. The survivor cannot

claim the amount on maturity, if the former is alive. In such cases, the legal representatives of the account holder who had died have no claim against the bank.

The survivor does not become absolute owner of the maturity proceeds. He holds the said amount in trust for the legal heirs of the account holder who has died. In Guran Ditta V. Ram Ditta (AIR 1928 Privy Council 172), where the deposit was held by a person with his wife on the terms that it is payable to either or survivor, the court held that on the death of the husband, it does not constitute a gift by him to his wife and there is a resulting trust in her favour in the absence of proof and contrary intention, there being no presumption in India of an intended advancement in favour of his wife.

The Vth Edition of 2010 of The Banking Law – in Theory and Practice, by S.N. Gupta, Advocate, narrates the consequences on death of one of the joint holder, at page 237 as under :-

“‘Former or Survivor’ or ‘Either or Survivor’ accounts are opened which are operated by the ‘Former or Survivor’ or ‘Either or Survivor’.

What will happen if there is death of one of the joint account holders whether the bank can get the proper discharge by paying in account of survivor. Another question will arise as to what is the liability of the survivor and whether he has to make some payments to the heirs and legal representatives of the deceased joint holder.

In such cases so far as the bank is concerned we can say that the bank will get a proper discharge by paying to the survivor. However, the survivor will be accountable to the heirs of the deceased joint holder. In the absence of a proof of the intention of the deceased to make the survivor the owner.”

Reserve Bank of India issues guidelines, instructions, directions to its 'Scheduled Commercial Banks' from time to time in order to improve quality of customer service. Parties counsel brought before the Court “Circular Letter of Reserve Bank of India” dated 9th June, 2005 issued by it to 'Scheduled Commercial Banks' in ordinary course of business, which is being reproduced hereunder highlighting the details mentioned in its paras 1 and 2, which are relevant to the facts of the case :-

“RBI/2004-05/490
DBOD. No.Leg. BC.95/09.07.005/2004-05

June 09, 2005

To

The Chairman/CEOs of All the Scheduled Commercial Banks
(Excluding RRBs)

Dear Sir,

Settlement of claims in respect of deceased depositors – Simplification of Procedure

Pursuant to the announcement in the Mid-Term Review of the Annual Policy of the RBI on November 3, 2003, the Committee on Procedure and Performance Audit on Public Services (CPPAPS) was constituted by the RBI with a view to improving the quality of public services to the common person. The Committee in its Report No.3 on 'Banking Operations : Deposit Accounts and other Facilities Relating to Individuals (Non-Business)', observed that the tortuous procedures, particularly those applicable to the family of a deceased depositor, caused considerable distress to such family members. While the instruction regarding settlement of claims of the deceased depositors had been issued to the banks vide our circular No.DBOD.BC.148/09.07.007/99-2000 dated March 14, 2000 and BC.56/09.07.007/2000-01 dated December 6, 2000, the present dispensation has been reviewed in the light of the recommendations of the CPPAPS and the following instructions are being issued, in **supersession** of all the earlier instructions on the subject, to facilitate expeditious and hassle-free settlement of claims on the death of a depositor.

2. ACCESS TO BALANCE IN DEPOSIT ACCOUNT

(A) Accounts with survivor/nominee clause

2.1 As you are aware, in the case of deposit accounts where the depositor had utilized the nomination facility and made a valid nomination or where the account was opened with the survivorship clause (“either or survivor”, or “anyone or survivor”, or “former or survivor” or “latter or survivor”), the payment of the balance in the deposit account to the survivor(s)/nominee of a deceased deposit account holder represents a valid discharge of the bank's liability provided :

- (a) the bank has exercised due care and caution in establishing the identity of the survivor(s)/nominee and the fact of death of the account holder, through appropriate documentary evidence;
- (b) there is no order from the competent court restraining the bank from making the payment from the account of the deceased; and
- (c) it has been made clear to the survivor(s)/nominee that he would be receiving the payment from the bank as a trustee of the legal heirs of the deceased depositor, i.e., such payment to him shall not affect the right or claim which any person may have against the survivor(s)/nominee to whom the payment is made.

2.2 It may be noted that since payment made to the survivor (s)/nominee, subject to the foregoing conditions, would constitute a full discharge of the bank's liability, insistence on production of legal representation is superfluous and unwarranted and only serves to cause entirely avoidable inconvenience to the survivor(s)/nominee and would, therefore, invite serious supervisory disapproval. In such case, therefore, while making payment to the survivor(s)/nominee of the deceased depositor, the banks are advised to desist from insisting on production of succession certificate, letter of administration or probate, etc., or obtain any bond of indemnity or surety from the survivor(s)/nominee, irrespective of the amount standing to the credit of the deceased account holder.

3. Premature Termination of term deposit accounts

4. Treatment of flows in the name of the deceased depositor

5. Access to the safe deposit lockers/safe custody articles

6. Time limit for settlement of claims

7. Provisions of the Banking Regulation Act, 1949

8. Simplified operational systems/procedures

9. Customer Guidance and Publicity

10. These instructions should be viewed as very critical element for bringing about significant improvement in the quality of customer service provided to survivor(s)/nominee(s) of deceased depositors.

11. Please acknowledge receipt.

Yours faithfully,

(Anand Sinha)

Chief General Manager-in-Charge”

A photo copy of the Circular letter dated 9th June, 2005 of Reserve Bank of India is being placed on record as part of record.

“In the case of ***Dalavayi Nagarajamma Vs. State Bank of India*** ***AIR 1961 Andhra Pradesh 320***, the High Court of Andhra Pradesh held that

“Where A deposits his own money in the joint names of himself and B (who may be his wife, daughter or any other person) on the terms that it is payable to either or survivor, the deposit on A's death does not constitute a gift by him to B. The burden of proof lies upon B in whose name the deposit is jointly taken to prove that a gift was intended or made. The mere fact that it is taken in the joint names does not lead to the

conclusion that a gift was made to the other person.”

In the case of ***Padmanabhan Bhavani Vs. Govindan AIR 1975 Ker 83***, considering above mentioned decision of Andhra Pradesh High Court in case of ***Dalavayi Nagarajamma*** (*supra*) wherein “one Ramaswamy deposited Rs.10,000/- in the joint names of himself and his concubine, who was the appellant, payable to either or survivor and after Ramaswamy's death, the appellant claimed the balance at the credit of the account on the ground that he had intended to make a gift of the amount of Rs.10,000/- to her, it was held that the appellant had not discharged the onus which was on her of proving the gift and that the mere fact that the deposit was made in the joint names does not lead to the conclusion that Ramaswamy gifted the amount to her”, the High Court of Kerala formulated following propositions in para 6 of judgment :-

“(i) A deposit made by a Hindu of his money in the joint names of himself and his wife or any other person, on the terms that it is payable to either or survivor, does not on his death constitute a gift by him to the other person.

(ii) In such a case without any declaration of trust, there is a resulting trust in favour of the depositor in the absence of any contrary intention or unless it can be proved that an actual gift of the amount was intended.

(iii) The principle of English Law that a gift to a wife is presumed, where money belonging to the husband is deposited at a Bank in her name or where a deposit is made, in the joint names of both husband and wife has no application in India. In other words, there is no presumption in India of an intended advancement as there is in England.

(iv) The burden of proving a contrary intention or gift is on the person who seeks to rebut the resulting trust in favour of the person, who makes the deposit.

(v) This burden could be discharged either by proving that there was a specific gift or that the owner of the money had a general intention to benefit the claimant and that it was in pursuance of that intention that he made the deposit in the claimant's name or transferred the deposit to the joint names of himself and the claimant.

(vi) In the absence of such proof the amount under the deposit

will form part of the owner's estate on his death and will be partible among the heirs.”

Admittedly 'S' died issue-less and plaintiff 'R' and defendant 'G' both claims that she was their 'Bua'. Undisputedly, there is absolutely no iota of evidence on record to show that Former 'S' had any intention to gift the amount of impugned FDRs in favour of Survivor 'G'.

It can be safely held that mandate “Either or Survivor” or “Former or Survivor” with regard to mode of payment deals only with valid discharge of Banks and has nothing to do with the law of succession or right of successors/legal heirs/legatee of deceased-depositor. In such case, if the Bank makes full payment of amount due to nominee or survivor, it gets a valid discharge of dues and has no obligation to seek discharge from other legal heirs of deceased, before making such payment. As per clear instructions mentioned in circular of R.B.I. Dated June 9th, 2005, issued to all the Commercial Banks (reproduced hereinabove), and also in view of various decisions discussed earlier, the survivor or nominee, has only a limited right to receive the amount as a trustee of the legal heirs of deceased-depositor and such payment to survivor/nominee, does not affect the rights or claims, which any person may have against survivor or nominee to whom the payment has been made. No doubt above Circular Letter has been issued by Reserve Bank of India in the year 2005, subsequent in time to the dispute, which arose between the parties on death of 'S' on 30.1.1985, but it contains only instructions or guidelines to Commercial Banks for improvement in quality of customer service and clarifies the legal position, hence is equally relevant in instant case.

In view of discussions made above, the Court is of the considered view that position of survivor 'G' upon death of depositor/former 'S' is only that of a nominee, to whom even if the payment of amount due had been made by Bank (though admittedly has not been made as yet), would have been only in due discharge of bank obligation and on such payment defendant would not have become absolute owner of the amount so

received by her, as survivor/nominee, rather would have been only a trustee of the legal heirs of 'S' including her legatee 'R' the plaintiff. Issue no.1 was decided by Trial Court in affirmative holding due execution of registered Will deed of her all movable/immovable properties including impugned FDRs by 'S' in favour of her nephew plaintiff 'R'. The lower Appellate Court did neither disagree with, nor displaced above findings. The contention of learned counsel for defendant that Former 'S' had no right to execute Will in respect of impugned FDRs, is bogus having no force and the findings of lower Appellate Court about Will being ineffective, in view of mandate mentioned over impugned FDRs, is wrong, illegal and perverse, as the lower Appellate Court failed to consider that survivor does not acquire absolute rights, rather his/her rights are that of a nominee or trustee of legal heirs of Former.

The Court is of the considered view that lower Appellate Court has committed grave and manifest error and acted wrongly and illegally in carving out a new case itself with regard to Will being ineffective in view of mandate mentioned over impugned FDRs as well as non maintainability of suit on this Count. The substantial question of law no.2 is, therefore, decided in affirmative in favour of plaintiff against the appellant.

In view of discussions made above, the Court has come to the conclusion that learned lower Appellate Court has committed grave and manifest error of law and acted wrongly and illegally in allowing the first appeal by setting aside judgment and decree passed by Trial Court, without displacing the findings recorded by Trial Court. The impugned judgment and decree do not deserve to stand and are liable to be set aside and appeal is liable to be allowed.

The appeal is **allowed** accordingly. The impugned judgment and decree dated 18.1.2002 passed by Additional District Judge, Kanpur Nagar, the lower Appellate Court in Civil Appeal No.264 of 2001, Smt.

Gurpyari Devi Vs. Ram Krishna Puri and others are set aside and the judgment and decree dated 4.9.2001 passed by Additional Civil Judge (Senior Division), Kanpur Nagar, the Trial Court decreeing the Civil Suit No.193 of 1986 are restored.

In the circumstances of the case, parties shall bear own costs of the litigation throughout.

Interim order, if any, stands vacated.

Let the lower court record be transmitted back to Court below along with a copy of this judgment for necessary action, if any, after preparation of decree.

Order Date :- 30.08.2019
VS/Tamang