

(2000) 09 DEL CK 0057
In the Delhi High Court
Case No : Suit No. 2024 of 1997

Maj. Gen Rajinder Singh Chowdhary

APPELLANT

Vs

S. Manjit Singh Chowdhary and Others

RESPONDENT

Date of Decision : 15-09-2000

Acts Referred:

Citation : (2000) 7 AD 1157 : AIR 2001 Delhi 15 : (2000) 88 DLT 173 : (2000) 55 DRJ 518

Hon'ble Judges : Dr. Arijit Pasayat, C.J;S.K. Mahajan, J;Mukul Mudgal, J

Bench : Full Bench

Advocate : Mr. Daljit Singh and Ms. Sujeeta Srivastava, for the Appellant; Mr. Gulab Chhabaria, for the Respondent

Judgement

Arijit Pasayat, C.J.—This matter was placed before the Full Bench on the basis of a reference made by one of us (S.K. Mahajan, J). Reference was felt necessary as the Hon"ble Judge was of the prima facie view that the Division Bench decision of this Court in Raghbir Singh and Others Vs. Budh Singh etc., may not be good law in view of decision of the Apex Court in Gulam Mahmood A. Malek Vs. State of Gujarat, .

2. Factual matrix giving rise to the reference is as follows:

plaintiffs had filed the suit for partition of property No.2-C/23, New Rohtak Road, New Delhi on the allegation that the property was owned by S. Mohan Singh, who expired on 27.5.1989 and during his life time he had left a will dated 22.7.88 by which he bequeathed all his moveable as well as Immovable including the property in question in favor of his wife Smt Ved Kaur. Said Smt Ved Kaur died intestate leaving plaintiff and defendants as the legal heirs. That being the position, it was pleaded that each one of them became entitled to 1/7th share and as the plaintiff did not want to join his brothers and sisters, he wanted property to be partitioned. Defendants filed written statement taking the stand that the deceased S. Mohan Singh had given a life estate to his wife under the will dated 22.2.1978 and under the said will, after the death of Smt Ved Kaur,

property has to be bequeathed in favor of Manjit Singh and M.P. Singh. In a sense their stand was that as the testator had bequeathed the property to Manjit Singh and M.P. Singh, no other heir could claim right, title or interest in the property and only defendants 1 and 2 were entitled to share therein.

On the pleadings, following issues were framed on 28.8.1998:

(1) Whether on the death of Shri Mohan Singh Chowdhary, his widow Smt Ved Kaur became an absolute owner of all the properties mentioned in Schedule-B to the plaint by virtue of the will dated 22.2.1987? If so, to what effect?

(2) Relief.

3. During trial, the plaintiff took the stand that bequest by S. Mohan Singh to his wife was absolute and anything which was repugnant to the absolute bequest given to the widow is inconsequential and Court has to look into the nature of bequest, which according to him was absolute. Reliance was placed on Gopala Menon's case (supra) for the purpose. In Raghubir Singh's case (supra), with reference to will, which has been quoted in the order of reference, it was observed that while conferring an absolute estate on the widow only in respect of moveable and it conferred a life estate in respect of Immovable property. The view was thought to be at variance with the view expressed by the Apex Court in Gopala Menon's case (supra) and may not be good law in view of Gopala Menon's case (supra) and Therefore the reference.

4. The crucial issue here would depend upon interpretation of various clauses of the will. In Gopala Menon's case (supra), the Apex Court was considering the effect of an absolute grant. Reading the will in its toto, the Apex Court observed that intention of the testator which one can reasonably gather is that the testator wanted to confer an absolute estate upon the legatee. In that context, it was observed that if legatee had obtained an absolute estate in the property bequeathed to her by her husband, she would be entitled to dispose of the property in any manner she liked and no authorisation by her husband would be necessary to empower her to dispose of the property by a will. Absolute and unrestricted power to dispose of the property is necessary. It is implicit when absolute estate is conferred, that grantee is free to deal with and dispose of the property in any manner. If an absolute grant is burdened with a restriction on alienation, the grant is good and the condition void.

5. Learned counsel appearing for the plaintiff submitted that a bare reading of the will under consideration would go to show that an absolute grant was intended and conditions, if any, hedged in are inconsequential. Learned Counsel for defendants 1 and 2, on the contrary, submitted that had the grantee disposed of the property during her life time, the decision in Gopala Menon's case (supra) would have applied, but when that was not done, other stipulations in the will are operative. According to him, the will is to be read in its entirety and it cannot be said that any stipulation in the will was of no consequence.

6. Will is a translation of the Latin "voluntas", which was a term used in the texts of Roman Law to express the intention of a testator. It is curious that the abstract term has come to mean the document in which the intention is contained. The same has been the case with several other English law terms, the concrete has superseded the abstract-obligation, bond, contract, are examples (Williams Wills and Intestate Succession, p.5). The word "testament" is derived from testate menties" it testifies the determination of the mind. A will is thus defined by Ulpian's Testamentum est mentis nostrae iusta contestatio in id solemniter facta to postmortem nostrum valeat." (20.1) Mudstones defines it by means of volants. It is voluntaries nostrae iusta sentential de eo quod quis post mortem sum fieri vult (or velit); the word iusta implying in each, that, in order to be valid, the testament must be made in compliance with the forms of law. It means, "the legal declaration of a man's intentions, which he will to be performed after his death". A last will and testament is defined to be "the just sentence of our will, touching what we would have done after our death". Every testament is consummated by death, and until he dies, the will of a testator is ambulatory. Nam omne testamentum more consummates ; et voluntate Testa meteoric est ambulatories usque ad mortem. "For, where a testament is, there must also of necessity be death of testator. For, a testament is of force after men are dead; otherwise it is of no strength at all while the testator liveth." "A will", says Jarman, "is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is in its own nature ambulatory and revocable during his life." (Jarman, 1st edn., p.11). This ambulatory character of a will has been often pointed out as its prominent characteristic, distinguishing it, in fact, from ordinary disposition by a living person's deed, which might, indeed postpone the beneficial possession or even a vesting until the death of the disposer and yet would produce such postponement only by its express terms under an irrevocable instrument and a statement that a will is final does not import an agreement not to change it. Schouler's Law of Wills, S.326. A will is the aggregate of man's testamentary intentions so far as they are manifested in writing, duly executed according to the Statute. (Per Lord Penance in Leimage Vs. Goodban, L.R. 1 P. & D.57, cited by Fry, J., in Green Vs. Tribe, 9 Ch. D.2231. From various decisions of the Apex Court e.g. Ram Gopal Vs. Nand Lal and Others, , Gnanambal Ammal Vs. T. Raju Ayyar and Others, , Raj Bajrang Bahadur Singh Vs. Thakurain Bakhtraj Kuer, ; Pearey Lal Vs. Rameshwar Das, , Ramachandra Shenoy and Another Vs. Mrs. Hilda Brite and Others, and Navneet Lal alias Rangji Vs. Gokul and Others, the following principles are well established:

1. "In construing a document whether in English or in vernacular the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered; but that is only for the purpose of finding out the intended meaning of the words which have actually been employed."
2. "In construing the language of the will the court is entitled to put itself into the

testator's armchair and is bound to bear in mind also other matters than merely the words used. It must consider the surrounding circumstances, the position of the testator, his family relationship the probability that he would use words in a particular sense. But all this is solely as an aid to arriving at a right construction of the will and to ascertain the meaning of its language when used by that particular testator in that document."

3. "The true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory."

4. "The court must accept, if possible such construction as would give to every expression some effect rather than that which would render any of the expressions inoperative. The court will look at the circumstances under which the testator makes his will, such as the state of his property of his family and the like. Where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Further where one of the two reasonable constructions would lead to intestacy, that should be discarded in favor of a construction which does not create any such hiatus."

5. "To the extent that it is legally possible, effect should be given to every disposition contained in the will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect but a court of construction will proceed to the farthest extent to avoid repugnancy so that effect could be given as far as possible to every testamentary intention contained in the will."

7. In, *Kaivelikkal Ambunhi (dead) by LRs. and others Vs. H. Ganesh Bhandary*, , it was observed that a will may contain several clauses and the latter clause may be inconsistent with the earlier clause. In such a situation, the last intention of the testator is given effect to and it is on this basis that the latter clause is held to prevail over the earlier clause. As observed in *Hammond Vs. Treharne* 1938(3) AER 308, if in a will there are two inconsistent provisions, latter shall prevail over the earlier clause. This is regulated by the well known maxim "*cum duo inter se pugantia reprinted in testamento ultimum ractum est*". This principle is also contained in Section 88 of the Indian Succession Act, 1925 which together with its illustrations, provides as under:-

88. The last of two inconsistent clauses prevails. Where two clauses of gifts in a will are irreconcilable ,so that they cannot possibly stand together, the last shall prevail.

Illustrations

(i) the testator by the first clause of his will leaves his estate of Ramnagar to "A",

and by the last clause of his will leaves it to "B and not to A". B will have it.

(ii) if a man, at the commencement of his will gives his house to A and at the close of it directs that his house shall be sold and the proceeds invested for the benefit of B, the latter disposition corporation will prevail.

This rule of interpretation can be invoked if different clauses cannot be reconciled. (See AIR 1935 187 (Privy Council) . It is to be noted that rules of interpretation of will are different from rules which govern interpretation of other documents like sale deed, or a gift deed, or a mortgage deed or, for that matter, any other instrument by which interest in immovable property is created. While in these documents, if there is any inconsistency between the earlier or the subsequent part or specific clauses inter se contained therein, the earlier part will prevail over the latter as against the rule of interpretation applicable to a will under which the subsequent part, clause or portion prevails over the earlier part on the principle that in the matter of will the testator can always change his mind and create another interest in place of the bequest already made in the earlier part or on an earlier occasion. Undoubtedly, it is the last will which prevails.

8. What is the intention of the testator has to be found out on a reading of the will and there cannot be any hard and fast rule of uniform application corporation to find out as to whether the grant was absolute or it was subject to any condition or stipulation. The true intention of the testator has to be gathered not only by attaching importance to isolated expressions but by reading the will as a whole with all the provisions and ignoring none of them as redundant or contradictory (See. Raj Bajrang Vs. Thakurani AIR 1953 SC 1953). As observed in Navneet Lal's case (supra), although there is no binding rule that the court should avoid intestacy at any cost, yet the court would be justified in preferring that construction of the will which avoids intestacy. Where the words are ambiguous attempt should be made to avoid that construction which leads to intestacy.

9. The rule of construction in the case of a will is that the court has to find out the meaning of the testator from the language used, taking the whole of the document together. In matters of construction of wills, decisions in other cases, do not and cannot afford sufficient guidance. It is not proper to interpret a will by searching for other cases-English or Indian. Intention is to be gathered from the words of the document bearing in mind its circumstances. In Narender Nath Sircar Vs. Kamal Basini Dasi (1896) 23 Cal.563: 23 I.A. 16: 6 MLJ 71. Lord Macgaghten said: "To construe one Will by reference to expressions of more or less doubtful import to be found in other Wills is for the most part an unprofitable exercise. Happily that method of interpretation has gone out of fashion in this country. To extend it to India would hardly be desirable. To search and sift the heaps of cases on Wills which cumber our English Law Reports, in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought and brought up under different conditions of life, seems almost absurd." It is seldom profitable to compare the words of one Will

with those of another or to attempt to find out to which of the Wills, upon which decisions have been given in reported cases, the Will before the Court approximates closely. Cases are helpful only in so far as the purport to lay down certain general principles of construction and at the present these principles seem to be fairly well settled. The cardinal maxim to be observed by Courts in construing a will is to endeavor to ascertain the intention of the testator. This intention has to be gathered primarily from the language of the document which is to be read as whole without indulging in any conjecture or speculation as to what the testator would have done if he had been better informed or better advised. (See. Gnanmbal's case (supra)). Rules of construction by analogy is a dangerous one to follow in construing will differently worded and executed in different surroundings. In Bipradas Goswami Vs. Sadhan Chandra Banerji, , Miller, J, said: It is always dangerous to construe the words of one will by the construction of more or less similar words in a different will which was adopted by a Court in another case. In Constituting the will the Court must consider the surrounding circumstances, the testator's position, his family relationship, the probability that he would use his words in a particular sense and many other things summed up in the picturesque phrase. The Court should put itself in the Veerattalingam and others Vs. Ramesh and others, , K. Balra Rao Vs. Datta Rao AIR 1992 SC 290. It is seldom profitable to compare the words of one will with those of another. The cardinal maxim to be observed by Courts in construing a will is to endeavor to ascertain the intention of the testator, which has to be gathered primarily for the language of the document read as a whole.

10. In the above background we feel unnecessary to go into the question relating to correctness of view expressed in Raghubir Singh's case (supra).

11. The Court while dealing with the matter has to read the will and decide true intention of the testator in the background of legal principles as set out above. We, Therefore, feel that this is a matter which shall be dealt, with by the learned single Judge. It is unnecessary to state that while deciding the suit, the legal principles applicable to interpretation of wills as broadly stated above shall be kept in view. The reference is accordingly answered.