

(2002) 02 KL CK 0036

In the High Court Of Kerala

Case No : A.S. No"s. 603 of 1991 and 250 of 1993

Vasudevan Nedungadi

APPELLANT

Vs

Santha Kovilamma

RESPONDENT

Date of Decision : 28-02-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 98(2)
Succession Act, 1925 — Section 131

Citation : (2002) 2 ILR (Ker) 430

Hon'ble Judges : M.R. Hariharan Nair, J

Bench : Single Bench

Advocate : M.C. Sen, G. Unnikrishnan, P.V. Ramesh Shankar, M.P. Sreekrishnan and Shalna Karthikeyan, for the Appellant; P.C. Ramachandra Menon and Prabha R. Menon, for the Respondent

Judgement

M.R. Hariharan Nair, J.—The aspects on which the opinion of the third Judge is sought u/s 98(2) of the CPC are the following:

"(1) Whether the absolute right made under Clause (9) can be taken away by Clause (10)?

(2) Whether Clause (10) is repugnant to Clause (9)?

(3) Whether Clause (9) can be reconciled with Clause (10)?

(4) Whether the intention expressed by the testator in Clause (10) is to outweighs the disposition in Clause (9)?"

2. The question is whether Clauses (9) and (10) of Ext. A3 will are repugnant to each other and as to the ultimate effect of the conflict between the two clauses. For brevity, I do not propose to reproduce the relevant Clause of the Will, the English version of which is available in para 8 oat page 5 of the dissenting judgment.

3. After stating in Clause (9) that the portions of the building, that is to say 4

rooms, hall and kitchen in the 2nd floor and the pathway specified in Clause (9) will go to all the 7 children of the testator equally with the power of alienation, what is mentioned in Clause (10) is that in case the testator's brother-in-law, who already holds the remaining parts of the building, demands a sale of the third portions after paying off Rs. 3,50,000/- with interest as detailed in para 3 of Ext. A1 dissolution deed and within five years of the testator's death, the said legatees should execute a sale deed for the said property after receiving a sum of Rs. 1,05,000/- from Vasudevan Nedungadi, who is the testator's said brother-in-law.

4. In the nature of the case, I deemed it necessary to refer to the manner in which the said Clauses have to be approached because in a case of Will, the construction to be adopted is governed by the special provisions in the Indian Succession Act, 1925 (for short "the Act") and the normal rule of interpretation of documents, as such, may not be applicable.

5. Section 81 of the Act provides that where there is an ambiguity or deficiency on the face of a Will, no extrinsic evidence as to the intentions of the testator shall be admitted. u/s 81, the meaning of any clause in a Will is to be collected from the entire instrument and all its parts are to be construed with reference to each other. As per Section 84, where a Clause is susceptible of two meanings according to one of which it has some effect, and according to the other of which it can have none, the former shall be preferred. u/s 85 of the Act, no part of a Will shall be rejected as destitute of meaning if it is possible to put a reasonable construction upon it. Section 87 embodies a wholesome directive viz., that the intention of the testator shall not be set aside only because it cannot take to the full extent; but effect is to be given to it as far as possible. u/s 88, where two clause or gifts in a Will are irreconcilable so that they cannot possibly stand together, the last shall prevail. u/s 95, where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the Will that only a restricted interest was intended for him.

6. I am of the view that if the Will in question is approached bearing in mind the said principles of construction, the one and the only possible view that can be taken is that what was given to the legatees under Clause (9) was not absolute grant; but a restricted one subject to the right of the brother-in-law to claim transfer under Clause (10).

7. They very important aspect to be taken note of in the matter of Ext. A3 Will is the fact that the legatees therein are the 7 children of the testator who were his normal legal heirs. Even in the case of an intestacy, they would have obtained absolute rights with the power of alienation over the property in question. Why then was a Will executed? According to me, the absence of the word "absolutely" while describing the grant in favour of the legatees is significant in this regard. What was intended was a restricted grant which would be subject to the exercise of the option of the brother-in-law, who was his long term associate as a partner in the Firm's business, though as on the date of the Will the partition had not

been in existence. The testator appears to have restricted the normal succession and make it subject to a liability to execute a conveyance in favour of his former partner in case he came forward to pay the sum of Rs. 1,05,000/- within the time specified therein and subject to fulfilling the other conditions. It is to be mentioned here that 3 of the 7 children understood this in the right perspective and implemented the desire of their predecessor by executing conveyance of their undivided right over the property mentioned in Clause (9) in favour of the said brother-in-law (hereinafter referred to as the pre-emptor) and the Will has, thus, come into effect atleast as regards the said co-legatees. Onerous bequests are not unknown to law and Section 122 of the Act itself provides that where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully. If the said principle is applied to the Will in hand, the legatees can take the right of ownership only subject to the obligation viz., to execute a sale deed to the pre-emptor, if he comes forward with a demand and ready to comply with the obligations on his part and in time.

8. The question may arise as to the need for specifying that the legatees will get rights on death. There are two purposes here; one is the possibility of the pre-emptor not complying with the conditions. The second is that if rights are to be conveyed to the pre-emptor, the legatees should themselves have the right. It is to enable them to execute the conveyance that in Clause (9) a right is conferred on them without describing it as absolute right; but specifying that it will include the power of alienation without which they could not have conveyed the rights to the pre-emptor. It may perhaps be possible even to consider the pre-emptor as one of the beneficiaries or legatees contemplated in the Will though this rights are not absolute but only subject to the fulfilment of the conditions imposed in Clause (10). There appears to be no bar for bequeathal of a right of pre-emption. Further, even assuming that there is some inconsistency between the two Clauses and that the direction to execute conveyance is irreconcilable with the right of alienation given under Clause (9), even then, Section 88 of the Act would apply and the last of the conditions viz., Clause (10) will prevail which again would enable the pre-emptor to get a sale deed as already obtained from 3 of the 7 legatees.

9. Even though the reference made to me can be answered as above even based on the said discussions made on first principles, I proceed to discuss about the provisions and authorities placed before me by the learned counsel. In fact, most of these already find their place in the two judgments written by the learned members of the Bench.

10. u/s 11 of the Transfer of Property Act where, on a transfer of property, an interest therein is created absolutely in favour of any person; but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction. In other words, a restriction repugnant to the interest created would be void. The question arises whether the grant in favour

of the pre-emptor is a repugnant clause? The difference between a repugnant provision and a defeasance clause is subtle. Where the intention of the transfer is to maintain the absolute estate conferred on the transferee; but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clause would be repugnant to the absolute transfer and therefore void. However, where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift must be taken to be valid and operative subject to the burden.

11. A condition imposed in a family arrangement that the property should be held without the right of alienation to a stranger came up for consideration in AIR 1932 158 (Privy Council) . It was held that the restriction was neither repugnant to law nor to justice, equity and good conscience and as such was valid.

12. In *Anukul Chandra Haldar Vs. Gurupada Haldar*, , earlier clause in the Will provided for a bequest of all the properties in favour of the son of the testator; but in the next clause the bequest was made subject to a liability for Sheba of deities. It was held that the second clause was not inconsistent with the earlier provision and an endeavour should be made to reconcile the apparently inconsistent clauses. In such cases, the second clause has to be taken as a proviso to the earlier part as held in *Narayana v. Arumugathammal* AIR 1958 Mad 431 in which case both the clauses would have proper meaning and sense. In *Raghunath v. Dy. Commissioner, Partabgarh* AIR 1929 PC 283 it was held that the question in such cases is as to what was the paramount intention of the testator as expressed in the Will. Reading the Will, as a whole, the testator's primary intention has to be gathered and given effect to *Kaivelikkal Ambunhi (dead) by LRs. and others Vs. H. Ganesh Bhandary*, provides that where there are inconsistent clauses, the last intention of the testator is to be given effect to that is to say, the latter clause should prevail over the former clause.

13. In *Anthony Thommen v. Thommen Alexander and Anr.* 1965) 2 KLR 283 it was held that the termination or the extinguishment of an estate is different from the imposing of restrictions on the mode of enjoyment of the estate and a nice distinction between a defeasance clause and a repugnant provision exists. If the intention of the testator or donor is to maintain an absolute estate and the restrictions are to restrict the mode of enjoyment or the manner in which the absolute powers should be exercised, the provision is a repugnant one. If the intention, on the other hand, is to terminate or extinguish the absolute estate then the provision would be a defeasance clause. Section 131 of the Indian Succession Act, it was held, provides for the termination of a bequest on the happening of a specified uncertain event or on the non-happening of the same by a gift over. It was held that such a clause, though restrictive, would be only a defeasance clause and would be valid.

14. In *S.N. Doss v. Arumugathammal* AIR 1962 Mad 259 it was held that in the

matter of a Will, the Court has to ascertain the real intention of the testator appearing from the plain language of the entire instrument; that one clause of the Will is as important as the other and the dominant intention has to be gathered from the cumulative effect of the clauses and that the Courts should not be astute in discovering repugnant provisions in a Will merely because of a slight inconsistency between portions of the testamentary instrument. As far as possible a harmonious construction of all the provisions in the Will should be arrived at as otherwise, the brushing aside of a particular clause on the ground of its repugnancy to another may result in creating a Will which was never contemplated by the testator. It was also held that the bequest conferring an absolute estate can be controlled and restricted by other clauses in the Will cutting down the absolute character of the bequest and that such restrictive clauses cannot be construed to be a mere repugnancy and treated as a void.

15. In view of the above provisions of law and for the reasons already mentioned, I am of the view that Clause (10) is not repugnant to Clause (9); and that the bequest in Clause (9) has to be read as controlled by Clause (10). I therefore answer the 4 questions referred to me as follows:

(1) What is given under Clause (9) to the legatees is not an absolute right; but a right to hold the property with powers of alienation and controlled by Clause (10).

(2) Clause (10) is not repugnant to Clause (9).

(3) Clause (9) can be reconciled with Clause (10).

(4) The intention expressed by the testator in Clause (10) has to be given due weight and implemented and to that extent it outweighs the disposition in Clause (9).

16. The further question to be considered is whether the appeals have to be disposed of. The proviso to Section 98(2) of the CPC stipulates that where there is divergence of opinion between the two Judges forming a Bench on a question of law, the appeal has to be heard upon that point by another Judge or Judge and such point shall be decided according to the opinion of the majority of the Judges who have heard the appeal including those who first heard it. The question arises whether it should be possible to the third Judge to dispose of the case. Considering the above guidelines, I am of the view that it is not permissible for this Court to dispose of the cases here. That power is available only to the Division Bench which heard the appeals. The cases were pending before the Division Bench and they have not yet been disposed of. When an opinion is given by the third Judge, it has necessarily to go to the Bench before which the cases were pending and it is for the learned Judges forming the Bench to dispose of the cases one way or the other.

I therefore direct that the records be placed before the Bench concerned which dealt with the appeals earlier along with my opinion as above, for appropriate disposal of the appeals.