

Atul

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 893 OF 2014
IN
SUIT NO. 517 OF 2014**

Lydia Agnes Rodrigues & 6 Ors.	...Applicants
<i>In the matter between</i>	
Lydia Agnes Rodrigues & 6 Ors.	...Plaintiffs
<i>Versus</i>	
Joseph Anthony D'Cunha & 7 Ors.	...Defendants

Mr. Cyrus Ardhesir, *a/w Ms. Neha Bhatt and Ayaz Bilawala i/b
M/s. Bilawala & Co., for the Plaintiffs.*
Mr. Owen Menezes, *i/b Johnson John, for the Defendants Nos. 8
and 9.*

CORAM: G.S. PATEL, J
DATED: 10th February 2015

PC:-

1. This is the Plaintiffs' Notice of Motion in a suit for partition. The property in question is CTS No. C-555, admeasuring about 765 sq.yds. situated at Saint Alexius Road, Bandra (West), Mumbai – 400 050. This is a plot of land with a structure known as Villa Bemvinda standing on it.

2. Annexed as Exhibit "A" to the plaint is a family tree describing the relations between the Plaintiffs and Defendants Nos. 1 to 7. The progenitor was one Andrew Satiro D'Cunha. He owned the property in question. He died a widower on 20th August 1977. Plaintiffs Nos. 1 and 2 are his daughters. Andrew also had another daughter, Annie; Plaintiffs Nos. 3 to 6 are her children. The 7th Plaintiff is Annie's daughter-in-law, Annie's son (the 7th Plaintiff's husband) Patrick having passed away. Andrew also had a son Joseph. Defendants Nos. 1 to 4 are Joseph's children (i.e., Andrew's grandchildren). Defendant No.5 is the widow of the deceased brother, Godfrey, of Defendants No. 1. Defendants Nos. 6 and 7 are the children of Defendant No.5. Defendant No.1 also had another brother, Basil, who died without heirs. Defendant No. 8 is a partnership firm of builders and developers. Defendant No. 9 is a partner of Defendant No. 8.

3. The dispute in the present case relates to the last Will and testament dated 20th February 1971 made by Andrew, the family progenitor. A copy of this Will is at Exhibit "D" to the plaint. Andrew died on 20th August 1977. On his death, his son Joseph (the father of Defendant No.1) filed Testamentary Petition No. 851 of 1979 for probate of his will. Probate was ordered to be issued on 3rd July 1980. The Will does not have numbered clause. I have taken the liberty of numbering these for convenience. The Will reads:

In the name of the Father and of the Son of the Holy
Spirit, Amen

THIS IS THE LAST WILL AND TESTAMENT of me,
ANDREW SATIRO de CUNHA of St. Alexius Road,
Bandra, Bombay-50.

- [1] I hereby REVOKE all Wills and Testamentary Dispositions by me heretofore made and declare this to be my last Will and Testament.
- [2] I HEREBY APPOINT my son JOSEPH de Cunha to be the sole Executor of this my Will. He shall have full power to appoint another if for any reason he is unable to set as Executor.
- [3] In my previous Will I had bequeathed my house "Villa Bemvinda" to my son Joseph and Edwin jointly, but now as my son Edwin has bought a house and will reside permanently in England, I now hereby given and bequeat "Villa Bemvinda" to my son Joseph.
- [4] It is my earnest desire that the house "Villa Bemvinda" should be disposed off but retained in my family and hence I hereby direct my son Joseph to pay my other four children, namely Annie, Lydia, Edwin and Ivy a sum of Rupees Five Thousand each.
- [5] In the event of the house being sold, the sale proceeds after deducting the expenses, should be divided into six shares, two of which should be to Joseph and the other children one share each.
- [6] Should any of my children pre-deceased me, his or her share should be divided equally among his or her children.
- [7] I hereby bequeath to my son Joseph any cash or furniture belonging to me.

[8] It is my earnest desire that the question of any division of my property should be settled by my children amicably by mutual consent without causing any unpleasantness and without resorting to a Court of Law.

IN WITNESS WHEREOF, ... *etc.*

(Emphasis and paragraph numbering supplied)

4. Briefly stated, the submission of Mr. Menezes, learned Counsel for the Defendants, is that the immovable property in question (Villa Bemvinda and the plot) was given to Joseph absolutely under Clause 3 of the will; and that next but one Clause 5 (which says that in event of the house being sold, the sale proceeds are to be divided into six shares with Joseph getting two of the six shares and the other children getting four) is void because it is a clause repugnant to the previous absolute bequest.

5. Mr. Ardeshi, learned Counsel for the Plaintiffs, on the other hand contends that the bequest in Clause 3 was not absolute. It was subject to a condition in Clause 5, and that condition is one in limitation or defeasance of Clause 3, not one that is repugnant.

6. It seems that on the basis of their interpretation of this Will, Defendants Nos. 1 to 7 have attempted to dispose of the entirety of the property to Defendant No. 8 under what is described as a Development Agreement dated 19th March 2014.

7. Before I consider the provisions of the Will and the development agreement, I must note that the Plaintiffs previously sought revocation of the probate in Miscellaneous Petition No. 86

of 2013. This Miscellaneous Petition was dismissed on 14th October 2013.

8. It is not in dispute that on 22nd December 2012, the Defendants Nos. 1 to 7 issued a public notice of their proposed transaction with Defendant No. 8. Mr. Menezes points out that this public notice was immediately followed by considerable correspondence between the Plaintiffs' Advocates and the Advocates for Defendants Nos. 1 to 7. His case is that it was for the first time after 35 years that the Plaintiffs made any claim to this property. He also points out that this correspondence continued through much of 2013 and it was followed by the Plaintiffs' application for revocation of the probate granted over three decades earlier. That Miscellaneous Petition for revocation, as I have noted, was dismissed on 14th October 2013. This suit was filed on 26th April 2014, several months later and the Notice of Motion was even further delayed. I will turn to the consideration of Mr. Menezes's submission on delay and limitation shortly.

9. The question that falls for determination, albeit at *prima facie* stage, is whether the bequest of the immovable property was an absolute bequest and whether the clause providing for the eventuality of that property being sold is void or not. First of all, I must consider whether there is in fact a sale. Mr. Ardeshir was at some pains to take me through several clauses of the Development Agreement dated 19th March 2014. Although this agreement purports to be one for development of the property on the basis that Defendants Nos. 1 to 7 do not have means to undertake that development themselves, there are several clauses that *prima facie*

indicate that what is intended and contemplated by that Development Agreement is a complete abdication by Defendants Nos. 1 to 7 of their rights in that property to the 8th Defendant, the developer. This is said to be for a considerable valuation, i.e. the provision of a substantial amount of money under Clause (3) (Rs. 5 crores), as also the provision of six flats admeasuring 1150 sq.ft. carpet area and eight car parking spaces in the proposed redeveloped building. Under Clause 13 of the agreement, the 8th Defendant is to get an irrevocable Power of Attorney which includes the power to sell and allot flats in the redeveloped building. Clauses 10, 11.2, 11.3 and 11.4 make it clear that Defendants Nos. 1 to 7 have no power of revocation of the authority granted to the 8th Defendant. Clause 12.3 also makes it abundantly clear that it is the 8th Defendant who will meet all claims in respect of the property. Finally clauses 15.4 and 15.5 also confer on the 8th Defendant full authority in relation to the redevelopment and for sale of the units in the redeveloped structure. There is, in addition, an obligation on Defendants Nos. 1 to 7 under Clause 23.1 to effect a conveyance and transfer all their rights in the property to the 8th Defendant.

10. This is, therefore, Mr. Ardeshir submits, an unambiguous sale of the immovable property. Terming it a Development Agreement is a mere camouflage. If this be so, he submits, the testamentary disposition in Clause 5 that requires the division of the sale proceeds must take effect and the Plaintiffs have, collectively, a substantial share in the property, including one that devolves on them through Andrew's deceased son Edwin.

11. Mr. Menezes on the other hand contends that Clause 5 for sale of share proceeds is void since the previous bequest to Joseph is absolute. He also states that the Plaintiffs have received a sum of Rs. 5,000/- each in satisfaction of their claim, if any, and this further establishes that the bequest to Joseph was absolute. He relies on a decision of a learned Single Judge of this Court in *Sardar Nawroji Pudumji v Putlibai*¹ in support of this proposition. This was a decision under the earlier Succession Act of 1865, Section 111 of which corresponds to Section 124 of the present Indian Succession Act, 1925. Mr. Menezes's submission is that the clause in that case was held to be a repugnant and, therefore, void restriction on a previous absolute bequest. In that case, it was conceded that Section 111 did apply to the Will in question. Clause 17 of that Will said that in the event of a legatee not being married or, if married, not having a lineal heir, his share would revert to his surviving sisters or their heirs. This Court held that this kind of a condition was void. I am unable to accept Mr. Menezes's submission for the simple reason that bequest in *Putlibai*'s case was clearly an absolute bequest and no time was specified for the happening of the event in question. What is to be noted is that clause 15 of the Will in *Putlibai*'s case made it clear that the legacy granted was to be "free of any restrictions". It was in this situation that the learned Single Judge held that the bequest was an absolute bequest.

12. Mr. Menezes then relies on the decision of the Supreme Court in *Mauleshwar Mani & Ors. v Jagdish Prasad & Ors*² and submits that where a testator has bequeathed an absolute interest in

¹ 1913 XV Bom L.R. 352

² JT 2002 (1) SC 450

property any subsequent bequest repugnant to the first is void. It is necessary to cite this decision at some length.

6. The first and the second question are overlapping and, we shall, therefore, consider both the questions together. Ordinarily, the rule of construction of a Will is that Will (bequeath) has to be read in its entirety and effort should be made that no part of it is excluded or made redundant. In other words, it is the duty of the Court to reconcile if there is any apparent inconsistency in a Will. In *Radha Sundar Dutta vs. Mohd. Jahadur Rahim and others* - 1959 SCR 1309, it was held that it there be admissible two constructions of a document, one of which will give effect to all the clauses therein while the other will render one or more of them nugatory, it is the former that should be adopted on the principle expressed in the maxim '*ut res magis valeat quam pereat*'.

7. We shall now look into the Will in the light of the rule of construction propounded by this Court in *Radha Sundar Dutta vs. Mohd. Jahadur Rahim* (supra). The relevant clause of the Will is as under:

[the original text is quoted]

The English translation of first of Will is:

The testator is wife whose name is Smt. Sona Devi, would be entitled to the entire assets and properties with the right of transfer and after death of Sona Devi. ...”

8. The first part of the Will provided that after the death of the testator or author of the Will, his wife whose name is Smt. Sona Devi would be entitled to the entire assets and properties of Jamuna Prasad with the right of transfer. The second part of the Will is that after the

death of Smt. Sona Devi nine sons of daughter's would inherit the property. Here what we are concerned with is whether Smt. Sona Devi has acquired an absolute estate or a limited estate under the Will. In this connection the employment of words "Pane ki Musthak" and "ba Akhtiar Intakal" in the Will which means entitlement of properties with the right of transfer are very relevant. It is obvious from the aforesaid clause that the testator conferred on an estate by providing that the wife would be entitled to get the property with right of alienation. Where the property has been given by a testator to the devisee with a right of alienation such bequeath is a conferment of an absolute estate. Thus the first devisee was to get the property with a right transfer under the Will and under subsequent clause the very same property was to go to the nine sons of the daughters after the death of the first devisees. The Will, therefore, gave in to express term inheritable estate with power of alienation to Smt. Sona Devi. We are, therefore, very clear in our mind that what was given to Smt. Sona Devi was an unlimited and an absolute estate.

9. ...

10. In *Ramkishorelal, and another vs. Kamalanarayan* - 1963 Suppl. (2) SCR 417, it was held that in a disposition of properties, if there is a clear conflict between what is said in one part of the document and in another where in an earlier part of the document some property is given absolutely to one person but later on, other directions about the same property are given which conflict with and away from the absolute title given in the earlier portion, in such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded. In *Radha Sundar Dutta vs. Mohd. Jahadur Rahim & others* (Supra), it was held where there is conflict between the

earlier clause and the later clauses and it is not possible to give effect to all of them, then the rule of construction is well established that it is the earlier clause that must override the later clauses and not vice versa. In *Rameshwar Bakhsh Singh and others vs. Balraj Kumar and others* - AIR 1935 Privy Council 187, it was laid down that where an absolute estate is created by Will in favour of devisee, the clauses in the Will which are repugnant to such absolute estate cannot cut down the estate; but they must be held to be invalid.

11. From the decisions referred to above, the legal principle that emerges, inter alia, are—

- 1) where under a Will, a testator has bequeathed his an absolute interest in the property in favour of his wife, any subsequent bequeath which is repugnant to the first bequeath would be invalid; and
- 2) where a testator has given a restricted or limited right in his property to his widow, it is open to the testator to bequeath the property after the death of his wife in the same Will.

12. In view of the aforesaid principles that once the testator has given an absolute right and interest in his entire property to a devisee it is not open to the testator to further bequeath the same property in favour of second set of persons in the same Will. A testator cannot create successive legatees in his will. The object behind is that once an absolute right is vested in the first devisee the testator cannot change the line of succession of first devisee. Where a testator having conferred an absolute right on anyone the subsequent bequeath for the same property in favour of other persons would be repugnant to the first bequeath in the Will and has to be held invalid. In the present case the

testator Jamuna Prasad under the Will had bequeath his entire estate movable and immovable property including the land in self-cultivation, house and groves etc. to his wife Smt. Sona Devi and thereafter by subsequent bequeath the testator gave the same very properties to nine sons of his daughters which was not permissible. We have already recorded a finding that under the Will Smt. Sona Devi had got an absolute estate and, therefore, subsequent bequeath in the Will by Jamuna Prasad in favour of nine daughter's sons was repugnant to the first bequeath and, therefore, invalid. We are, therefore, of the view that once the testator has given an absolute estate in favour of first devisee it is not open to him to further bequeath the same very property in favour of second set of persons.

(Emphasis supplied)

13. I am unable to see how this decision is of any assistance to Mr. Menezes. In the first place the situation contemplated is of two bequests, one following the other and not a *condition* attached to the first. Secondly, the Supreme Court has in terms held that a Will should ordinarily be read in its entirety and every effort should be made to ensure that no part of it is excluded or made redundant. In that case, the first legatee had power not only of absolute ownership but the right of transfer or alienation. The Supreme Court noted that the Testator conferred an estate by providing that the wife would be entitled to the property with a right of alienation and where there was such a writing of alienation the bequest was a conferment of an absolute estate. The Supreme Court noted that it is only where there is a clear conflict and it is not possible to give effect to all the clauses that the subsequent bequest fails. The principle is that a Testator cannot create successive legatees in his

Will; once an absolute right is vested in the first legatee, the Testator cannot change the line of succession of the first legatee.

14. Mr. Menezes then sought to rely on a decision of the Division Bench of this Court in *Nina Agarmalla v Ashok Gupta & Ors.*³ to say that the grant of probate operates *in rem* and is conclusive evidence as to the execution and validity of the Will. This submission is entirely misplaced. The Plaintiffs in this suit are not challenging the Will. Indeed, quite the reverse: they are seeking to enforce a provision of it. This is made amply clear by paragraph 17 of the plaint, which read thus:

17. The Plaintiffs say and submit that by the said Will dated 20th February 1971, the said deceased had bequeathed the said bungalow (Exhibit 'B' hereto) to his son Joseph D'Cunha with a condition that in the event that the said Joseph D'Cunha were to sell the property, each one of his other children would be entitled to a share and the said Joseph D'Cunha would be entitled to two shares. This was not an absolute bequest but a bequest with a condition attached. The said Joseph took the bequest subject to such a condition. The said land (Exhibit 'B' hereto) was not bequeathed by the deceased under his Will and therefore, it is governed by Intestate Succession. All the children of the deceased would therefore have an equal share in the said land (Exhibit 'B' hereto). The Defendants Nos. 1 to 7 are not the sole or absolute owners in respect thereof and had no right or authority to deal with the same. The Plaintiffs totally have a undivided 3/5th share + 3/4th share of deceased Edwin D'Cunha's 1/5th share in the said land and the Defendants have a 1/5th share + 1/4th of the deceased

³ 2014 (4) Mh.L.J. 464

Edwin D’cunha’s 1/5th undivided share, right, title and interest in the said land. The Plaintiffs state that in the said bungalow the share of the Plaintiff is 3/6th share +3/4th share of deceased Edwin D’Cunha’s undivided 1/6th share and the Defendants have 2/6th + 1/4th of deceased Edwin D’Cunha’s undivided 1/6th share. The Defendants Nos. 1 to 7 were constructive trustees in respect thereof. The Defendants Nos. 1 to 7 were holding the said land being (Exhibit “B” hereto) and the said bungalow being (Exhibit “C” hereto) for the benefit of all the parties. The Plaintiffs and the Defendants were the co-owners of the said land being (Exhibit “B” hereto).

15. This also addresses Mr. Menezes’s submission that the suit is barred by limitation and that it should have been filed within three or twelve years of the probate being granted. That is wholly incorrect. The Petitioners are not impeaching the probate in this suit at all. Their cause of action arose only when Defendants Nos. 1 to 7 sought to divest themselves all the property in question and that was only on 19th March 2014. Prior to that, the present cause of action did not arise to the Plaintiffs. Mr. Menezes’s reliance on the decision of the Supreme Court in *Dilboo (Smt) (Dead) by Lrs & Ors. v Dhanraji (Smt) (Dead) & Ors.*⁴ is of no assistance in these circumstances.

16. In contrast, Mr. Ardeshir’s reliance on the decision of the Supreme Court in *Siddamurthy Jayarami Reddy v Godi Jayarami Reddy*⁵ is, in my view, apposite. In paragraphs 27, 28, 30 and 31 the Supreme Court drew a distinction between a clause that is

⁴ (2000) 7 SCC 702

⁵ (2011) 5 SCC 65

repugnant and a clause that is in defeasance. A repugnant provision is void. A clause in defeasance is not. The Supreme Court said:

27. It is well settled that the court must put itself as far as possible in the position of a person making a will in order to collect the testator's intention from his expressions; because upon that consideration must very much depend the effect to be given to the testator's intention, when ascertained. The will must be read and construed as a whole to gather the intention of the testator and the endeavour of the court must be to give effect to each and every disposition. In ordinary circumstances, ordinary words must bear their ordinary construction and every disposition of the testator contained in the will should be given effect to as far as possible consistent with the testator's desire.

28. The above are the principles consistently followed and, we think, ought to be guided in determining the appeal before us. What then was the intention of this testator? The only son of the testator had predeceased him. At the time of execution of the will, he had his wife, widowed sister, widowed daughter-in-law, daughter and minor granddaughter surviving; the only other male member was his son-in-law Rami Reddy. He intended to give all his properties to the granddaughter but he was aware that after her marriage, she would join her husband's family. The testator intended that his entire estate remained in the family and did not go out of that and having that in mind, he desired that his daughter adopted a son with the consent of her husband and his granddaughter married the adopted son of his daughter. He, therefore, stated, "I intend to give all my belongings,

movable and immovable properties to the said Lakshumamma and the adopted son of my daughter Pitchamma". He expressed in unequivocal terms, "after my demise, my granddaughter Lakshumamma who is the daughter of my son shall have absolute rights in my entire properties".

30. The clause, however, upon which the appellants' are claiming the rights in the properties of Rami Reddy is the clause that reads "... if my daughter did not take any boy in adoption and if the said boy will not accept to marry my granddaughter Lakshumamma, I intend to give my aforesaid properties, one-third share to my daughter Pitchamma and her husband, who is also my son-in-law Rami Reddy together. The remaining two-third share is given to my granddaughter Lakshumamma".

31. Mr R. Sundaravardan, Senior Counsel for the appellants is right in contending that the above clause in the will is not a repugnant condition that invalidates the will but is a defeasance provision.

(Emphasis supplied)

17. Now if the duty of the Court is to try to give effect to the Will in its entirety, I do not think it is possible to completely jettison a specific clause in the Will, especially when it is possible, at least at this *prima facie* stage to take an alternative, plausible view, one that preserves the integrity of the Will as a whole. What has the Testator Andrew said? Plainly, it is this: first that he wishes the house at Bandra to remain in the family. His son Edwin has migrated to England. He, therefore, directs Joseph to pay his other four children (Annie, Lydia, Edwin and Ivy) a sum of Rs. 5,000/-. Now this clause in itself presents a difficulty for Mr. Menezes. For, if Mr. Menezes is correct, and there was an absolute bequest to Joseph in

the preceding Clause 3, no question ever arose of paying any amount to any of the other four children under Clause 4. Yet, admittedly, this amount of Rs. 5,000/- has been paid. Clearly, this clause (Clause 4) recognizes the right of the other four children at least to some extent. There, then follows the contentious Clause 5 where Andrew contemplates a situation where the house is sold, i.e., of it passing out of the family entirely. In that eventuality, he provides that the sale proceeds of the house should be divided in the manner he stipulates: two shares to Joseph and one share each to the other four children. Joseph, therefore, has a right to the property so long as he continues to hold it. But he has no right of alienation. His right is considerably restricted (and perhaps even constricted) by the very clause that Mr. Menezes says is void. This is in complete distinction to the cases cited by Mr. Menezes. Joseph has no right of alienation of the property without a division of the said proceeds; hence, the bequest to him is not absolute, but clearly a conditional bequest. That, I think, is abundantly clear from the provisions of the Will correctly read.

18. To refuse an injunction to the Plaintiffs would, undoubtedly, create an irreversible situation causing the Plaintiffs irretrievable prejudice and injury. The balance of convenience seems to me to be in favour of the Plaintiffs, especially since there is, as yet, no development on the property. In my view, the Plaintiffs have made out a sufficiently strong *prima facie* case for the grant of relief. However, I do not think that it is necessary to appoint a Court Receiver at this stage. The Plaintiffs' rights to apply for a Receiver can be kept open.

19. The Notice of Motion is made absolute in terms of prayer clauses (a), (b) and (c), which read thus:

(a) That pending the hearing and final disposal of the suit, the Defendants by themselves, their servants and /or agents be restrained by a temporary order and/or injunction from in any manner whatsoever carrying on any construction on the suit property described in Exhibit “B” and “C” to the plaint or any part thereof or from taking any further steps in pursuance to the Development Agreement dated 13th March 2014 arrived at between the Defendant No. 1 to 7 and 9 including making any applications to the Municipal Corporation and/or any other statutory authority for the purpose of carrying on construction;

(b) That pending hearing and final disposal of the suit the Defendants their servants and agents and/or any other person claiming through or under them be restrained by an order of injunction from this Hon’ble Court from selling, alienating, encumbering, disposing off or creating any third party interest and/or parting with possession and /or dealing with the suit property in any manner whatsoever and more particularly described in Exhibit “B” and “C” to the plaint or any part thereof;

(c) That pending the hearing and final disposal of the suit the Defendants, their servants and agents and/or any other person claiming through or under them be restrained by an order of injunction from this Hon’ble Court from demolishing any part of the said bungalow which is more particularly described in Exhibit “C” to the plaint or any part thereof.

20. The Plaintiffs will be at liberty to apply for the appointment of a Court Receiver upon demonstrating changed circumstances.

21. The Notice of Motion is disposed in these terms with no order as to costs.

(G. S. PATEL, J.)