

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE SMT. JUSTICE P.V.ASHA

WEDNESDAY, THE 30TH DAY OF SEPTEMBER 2015/8TH ASWINA, 1937

RFA.No. 65 of 2014 ()

AGAINST THE ORDER/JUDGMENT IN OS 80/2011 of III ADDL.SUB COURT, ERNAKULAM
DATED 31-07-2013

APPELLANT(S)/1ST DEFENDANT:-

SMT.SOBHA MANI WALTER, AGED 61 YEARS,
WIFE OF LATE SRI.T.J.WALTER, RESIDING AT C.C 55/4053
THOUDAIL HOUSE (MILL VIEW), MILL LANE, PALLIMUKKU
CHURCH LANDING ROAD, PERUMANOOR.

BY ADVS.SRI.ANIL S.RAJ
SMT.K.N.RAJANI
SMT.ANILA PETER
SRI.J.VIVEK GEORGE
SMT.C.PRABITHA
SRI.N.S.MOHAN DAS
SRI.RADHIKA RAJASEKHARAN P.

RESPONDENT(S)/PLAINTIFF:-

SRI.T.J.ANGELO, AGED 76 YEARS
S/O.LATE SRI.T.A.JOSEPH, THOUDAIL HOUSE
NOW RESIDING AT POWER DAN DRIVE, CORNWALL, ONTARIO
K6J2N3, REPRESENTED BY HIS POWER OF ATTORNEY HOLDER
SRI.WILSON KALAPURAKAL
AGED 73 YEARS, SON OF LATE SRI.JOSEPH, KALAPURAKAL
KALAPURAKAL HOUSE, CHITOOR ROAD, VADUTHALA
KOCHI - 682 013.

R1 BY ADV. SRI.JAIJI ITTEN

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON
30-09-2015, ALONG WITH RFA. 81/2014, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

ANTONY DOMINIC & P.V.ASHA, JJ.

R.F.A.Nos.65 & 81 of 2014

Dated this the 30th day of September, 2015

JUDGMENT

Antony Dominic, J.

1. Appellant in these appeals is the first defendant in O.S.No.80/11 filed by the respondent in RFA.No.65/14 and the plaintiff in O.S.No.647/10, both on the file of the IIIrd Additional Sub Court, Ernakulam. In these appeals, the appellant is challenging the common judgment and decree rendered by the Sub Court, dismissing O.S.647/10 filed by the appellant and decreeing O.S.80/11 filed by the respondent in RFA.No.65/14.

2. Briefly stated facts of the cases are that late T.A.Joseph acquired 8 cents of land with a building therein, bearing Door No.39/5128 of the Cochin Corporation, by document No.2436/1119 ME of the Ernakulam Sub Registry. In 1980, Sri.T.A.Joseph executed will No.1/1980 of SRO, Ernakulam, bequeathing his properties in the manner as stated therein, the details of which will be dealt with in

the course of this judgment. Sri.T.A.Joseph had 8 children and at the time of his death on 24.11.1981, he was survived by his wife Smt.Eleswa and 6 children. On 20.6.1998, Smt.Eleswa also expired.

3.It was the case of the respondent in RFA.No.65/14, who is the plaintiff in O.S.80/11, that being the legatee under the will, he permitted the appellant and her deceased husband Sri.Walter, who is one of the sons of late Sri.T.A.Joseph, Smt.Eleshwa, the deceased wife of Sri.T.A.Joseph and Smt.Thresa, a physically challenged daughter of Sri.T.A.Joseph, were to reside in the building during the period 1981 to 1988. It is stated that on 24.1.2008, Sri.T.J.Walter, husband of the appellant, also expired and according to the respondent in RFA.No.65/14, on the request of the appellant that she be allowed to continue to occupy the building for another one year, again permission was granted considering the fact that by residing in the building, the appellant would also look after his physically challenged sister Thresa.

4. It is stated that while so, the appellant filed O.S.647/10 before the Sub Court, Ernakulam impleading Smt.Thresa and other two family members and seeking a declaration that plaint B schedule property, which includes a portion of the residential building also, is vested in her absolutely by adverse possession and limitation. It was thereafter that the respondent in RFA.65/14, a resident of Canada, filed O.S.80/11 through his Power of Attorney Holder, impleading the appellant and his physically challenged sister as defendants and seeking to declare his ownership over the plaint schedule property and a mandatory injunction removing the defendants from the plaint schedule property. During the pendency of the proceedings, Smt.Thresa also expired. In the plaint, the plaintiff Sri.Angelo contended that by virtue of Ext.B2 Will (Will No.1/1980 of SRO) his father late Sri.T.A.Joseph had bequeathed the plaint scheduled property absolutely to him and that therefore, he was entitled to a declaration of his ownership and a mandatory injunction removing the defendants from the plaint schedule property. In the written statement, the appellant inter alia contended that she was

unaware of Ext.B2 will and that the will was created by fraud or coercion and was not executed by the free will of the testator. She also contended that at the relevant time, Sri.T.A.Joseph did not have the mental capacity to execute a will, that the will was executed at the instance of the plaintiff without the knowledge or consent of the testator, that the so called attestors of the will are henchmen of the plaintiff, that the attestors did not see Sri.T.A.Joseph executing the will and that therefore, the will is vitiated by malafides and was not intended to be acted upon.

5.The plaintiff in O.S.80/11 was not a party to O.S.647/10 filed by the appellant where she had claimed of having perfected title over the plaint B schedule property, which is a portion of the property covered by Ext.B2 will No.1/1980. Therefore, the plaintiff in O.S.80/11 filed IA.4239/11 seeking to implead himself as additional 4th defendant. Accordingly, by order dated 6.8.2012, he was impleaded as additional 4th defendant in O.S.647/10. In the written statement filed, he placed reliance on

Ext.B2 will and contended that the plaint schedule property was bequeathed to him by his deceased father. He also stated that on the strength of the will, the property was mutated in his name and was in his possession.

6.The suits were tried jointly. The appellant and three witnesses were examined as Pws.1 to 4 and Exts.A1 to A27 were marked. On behalf of the plaintiff in O.S.80/11, his power of attorney holder and two other witnesses were examined as Dws.1 to 3. CW1, the Advocate Commissioner, was also examined. On behalf of the defence, Exts.B1 to B21 were marked. On conclusion of the trial, the court below rendered a common judgment and decree on 31.7.2013, dismissing O.S.647/10 filed by the appellant and decreeing O.S.80/11 filed by the respondent in RFA.65/14. It is in this background, these appeals are filed.

7.We heard learned counsel for the appellant and the learned counsel appearing for the respondents.

8. At the outset itself, we may clarify that the appellant had filed O.S. 647/10 impleading Smt. Thresa and Sri. T.J. Felix, who are the children of late Sri. T.A. Joseph; and a son of the second defendant therein as the defendants. In that suit, the reliefs claimed were a declaration to the effect that the plaintiff had perfected her rights and title over plaint B schedule property by continued and uninterrupted possession of the plaint B schedule property adverse to the rights and interests of defendants and their predecessors-in-interest over the same. She had also sought a permanent prohibitory injunction restraining the defendants and their men and agents from trespassing into plaint B schedule property.

9. Plaint A schedule is the 8 cents of property with the residential building therein which were acquired by late Sri. T.A. Joseph and plaint B schedule property, in respect of which the decree was sought, is the half portion of plaint A schedule property, having an extent of 4 cents including half portion of the residential building. It was in that suit that the

plaintiff in O.S.80/11 was also impleaded by order in IA.4239/11. In the judgment, the court below specifically found that the plaintiff had failed to establish that she has been possessing and enjoying plaint B schedule property against the real owners as of right, without interruption for the statutory period and thereby perfected her title by adverse possession. On that basis, the court held that the plaintiff was not entitled to get the reliefs sought for in O.S.647/10.

10. Though RFA.81/14 has been filed against the judgment and decree of the trial court in O.S.647/10, before us, no arguments were urged impugning the judgment and decree of the court below. Therefore, for that reason itself, RFA.81/14 deserves to be dismissed and we do so.

11. It is important to bear in mind that O.S.647/10 was filed by the appellant alleging that she had perfected title over plaint B schedule property, which is a portion of the plaint schedule property in O.S.80/11, by adverse possession and limitation.

when the plea of adverse possession is raised by the plaintiff against the defendants, in law, the plaintiff proceeded admitting that the defendants had title over the property and that the plaintiff has been possessing and enjoying the property openly against the real owner as of right without interruption for the statutory period and has accordingly perfected her title over the property. When the judgment, rejecting this contention raised by the plaintiff, has attained finality, the findings in that judgment would be res judicata against the plaintiff. Therefore, by virtue of the dismissal of RFA.65/14, the findings in the judgment in O.S.647/10 that the defendants therein have title over the property would operate as res judicata against the appellant/plaintiff. Therefore, it is not permissible for the appellant to dispute the title of the respondent in RFA.65/14 over the plaint schedule property, which is the plaint A schedule property in O.S.647/10. Therefore, once the title of the plaintiff in O.S.80/11 is thus held in his favour, for that reason itself, RFA.65/14 filed against the judgment and decree in O.S.80/11 also is liable to be

dismissed.

12.Be that as it may, we shall proceed to examine the contentions raised by the appellant in so far as RFA.65/14 is concerned. In this appeal, the contention raised by the counsel for the appellant is mainly two fold. The first contention raised was that the execution of the will is not properly proved in terms of the statutory provisions governing the same. The second contention raised was that on account of the repugnant bequests made in the will, in view of section 88 of the Indian Succession Act, the latter bequest in favour of the deceased wife and daughter of late Sri.T.A.Jospeh would prevail over the former bequest made in favour of the plaintiff in O.S.80/11.

13.In so far as the first contention of the appellant that the execution of the will was not proved is concerned, execution of an unprivileged will like Ext.B2, is governed by the provisions of section 63 of the Indian Succession Act, 1925. This provision requires that every testator shall execute his will

according to the rules which require that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction. It is also provided that the signature or mark of the testator or the signature of person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will. Further, the will is required to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will in the presence and by the direction of the testator or has received from the testator a personal acknowledgment of his signature or mark or the signature of such other person and each of the witnesses shall sign the will in the presence of the testator but it shall not be necessary that more than one witness be present at the same time. It is also provided that no particular form of attestation shall be necessary.

14. The proof of execution of a document required by law to be attested shall be in the manner provided in

section 68 of the Indian Evidence Act, 1872. As per this section, if a document is required by law to be attested, it shall not be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

15. Section 69 of the Evidence Act deals with the case of proof of a document where no attesting witness is found. It provides that if no such attesting witness can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting and that the signature of the person executing the document is in the handwriting of that person.

16. In this case, Ext.B2 is the will executed by late Sri.T.A.Joseph. On behalf of the plaintiff in O.S.80/11, who is now residing in Canada, his power of attorney holder was examined as DW1. DWs.2 and 3 are his sister's husband and wife's sister's husband respectively. DWs.1 and 3, in their evidence, have

not spoken anything about the execution of the will. DW2, plaintiff's sister's husband, i.e., the son-in-law of the testator, has deposed about the contents of the will. He has also stated that the will has been attested by Rev.Fr.Varghese Valavanthara, Parish Priest of St.George's Church and Sri.V.N.Subhramania Iyer, retired Principal of Government Law College, Ernakulam. He has specifically stated that both the attesting witnesses are no more and this assertion was not contradicted in cross examination. He has also stated that Sri.T.A.Joseph has affixed his signature to the will and that this was witnessed by the attestors of the will. Further, he has deposed that the attestors have affixed their signature in the presence of the testator. He has also spoken about the registration of the will. He further deposed that he was a witness to the registration of the will and he has spoken about the testamentary capacity of Sri.T.A.Joseph to execute the will. The will was marked through this witness. In cross examination, he has stated that Sri.Subhramania Iyer, one of the attesting witnesses of the will, was a neighbour and

a close friend of the deceased. A perusal of the cross examination shows that nothing has been brought out in the examination to cast any shadow of doubt on the evidence tendered by this witness.

17. This, therefore, means that the only evidence regarding execution, attestation and registration of the will is that of DW2. A perusal of the evidence of DW2 proves beyond any doubt that the will was executed in full compliance with the provisions of section 63 of the Indian Succession Act and his evidence further shows that the execution has been properly proved in terms of the provisions of the principles contained in sections 68 and 69 of the Evidence Act. This shows that there is absolutely no merit or substance in the case of the appellant that the will was not validly executed by the deceased and that it was not properly proved by its propounder.

18. Incidentally it was also contended by the learned counsel for the appellant that the propounder of the will has not succeeded in removing the suspicious circumstances surrounding the execution of the will.

It is true that it is the burden of the propounder of the will to remove the suspicious circumstances surrounding the will's execution. However, the suspicious circumstances which are required to be removed by the propounder of the will are those circumstances which are pointed out by the persons who are impugning the validity of the will. In so far as this case is concerned, in the written statement in O.S.80/11 about which we have already made reference, the only suspicious circumstance that can be considered to have been pointed out by the appellant is that Sri.T.A.Jospeh did not have the testamentary capacity to execute the will. The appellant has not adduced any evidence in this behalf. Moreover, not even a question to that effect was put to DW2, who has deposed about the execution of the will. Added to this is the fact that in clear terms, DW2 has deposed in his deposition that the testator was fully conscious and had the testamentary capacity to execute the will. We, therefore, do not find any substance in this contention either.

19.The other contention that was urged by the learned counsel for the appellant was relying on section 88

of the Indian Succession Act which provides that when two clauses of gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail. Before dealing with this contention, it is necessary to make a detailed reference to the contents of Ext.B2 will.

20.Clauses (3), (4) and (5) of Ext.B2 will, being relevant, reads thus:

(3) I do hereby give, devise and bequeath to my unmarried and crippled daughter Thresa aged forty nine, her heirs, executors or administrators, for her use and benefit absolutely for ever, all my movable properties including furnitures money in my accounts in the Bank.

(4) Taking into consideration, the various help rendered to me and to my family during all these years, I do hereby give, devise and bequeath to my Son T.J.Angelo aged 40 who is now residing at Cornwall, in Canada, his heirs and executors, 8 cents (eight cents of land) in Sy.No.866/25 in Perumanoor Desom, Kanayannur Taluk, Ernakulam District which was purchased by me with my own money as per Document No.2436/1119 M.E. of Ernakulam Sub Registry Office and the House bearing Door No.XXXV/1545 of Cochin

Corporation situated therein with all appurtenance thereto wherein now I am residing with my wife Elishwa and my daughter Thresa subject to the following conditions:-

(A) My son Angelo should maintain and give all help to my wife Elishwa and my daughter Thresa during their life time and do all religious ceremonies for them after their death.

(B) My wife Elishwa and my unmarried crippled daughter Thresa have the absolute right and authority to reside in the said House during their life time.

(C) During the life time of my wife Elishwa and daughter Thresa they have got absolute right to sell, alienate, transfer any interest or dispose of the above property and building in whole or in part. But before making such alienations or transfer, the written consent of my son Angelo should be obtained in so long as he is alive, and the deed of transfer should be signed by him also, without which no alienations will be valid or legal under any circumstances.

(D) My son-in-law Fabian son of Koduveliparambil Joseph has absolute right and freedom to have free ingress and egress to the above property and building during the life time of my wife and daughter and nobody has any right to object to his entry in the above properties.

(5) Notwithstanding anything contained in any of the conditions mentioned in A to C of para 4 above, in case the above property and building are acquired by any authority under the provisions of the Land Acquisition Act, my above named son T.J.Angelo alone is entitled to claim and receive the compensation from the authorities for such acquisition and the entire money so received by him should be utilised for the use of my wife and daughter Thresa."

21. Reading of the above provisions of Ext.B2 would show that by clause (3), the testator has bequeathed to his physically challenged daughter Thresa, all his movable properties including furnitures and money in his bank accounts. Clause (4) shows that taking into account the various helps rendered to him and his family, the testator has bequeathed to his son T.J.Angelo, the plaintiff in O.S.80/11. who is a resident of Canada, 8 cents and the building therein purchased by the testator. This bequest in favour of Angelo is subject to the conditions incorporated in sub clauses (A) to (D). As per sub clause (A), Angelo is made liable to maintain and give all help to his mother and sister during their life time. As

per clause (B), his mother and sister have been given right to reside in the house during their life time. As per clause (C), which is the controversial one, during the life time of his mother and sister, they have been given the absolute right to sell, alienate, transfer any interest or dispose of the above property and building in whole or in part. However, this right given to Eleshwa and Thresa is subject to the condition that before making any such alienation or transfer, the written consent of Angelo should be obtained so long as he is alive and he should also sign the deed of transfer. Clause (D) provides that DW2 has the absolute right and freedom to have free ingress and egress to the property and the building. By clause (5), it is provided that notwithstanding anything contained in sub clauses (A) to (C) above, in case the property and building are acquired by any authority under the provisions of the Land Acquisition Act, Angelo alone shall be entitled to claim and receive the compensation from the authority concerned. It is also provided that the entire money so received by Angelo should be utilised for the use of his mother and sister.

22. Referring to these provisions of the will, the contention now raised before us is that the provisions in clause 4(C) is repugnant to the bequest contained in clause (4) and that the aforesaid two clauses being irreconcilable, the gift contained in condition (C) will prevail over the bequest as per clause (4). Further contention raised is that in view of the provisions contained in section 10 of the Transfer of Property Act and section 138 of the Indian Succession Act, the provision in clause 4(c) that without the written consent and without Angelo being a party to the deed of transfer, alienation by Eleshwa and Thresa will be invalid and illegal, is void.

23. This contention raised by the counsel for the appellant calls for a thorough examination of the provisions of the will. However, before undertaking such an exercise, we consider it apposite to examine the law laid down by the Apex Court and this Court about the manner in which a will is to be understood

and how section 88 of the Indian Succession Act has been interpreted.

24. In P. Krishna Bhatta v. Narayana Bhatta [AIR 1962 Ker 322], a Bench of this Court held that the distinction between a defeasance clause and a repugnant one, which is sometimes a nice one, must be constantly kept in view and that where the intention of the donor or testator is to maintain an absolute estate conferred on the donee, but he adds some restrictions in derogations of the incidents of such absolute ownership, the clause is a repugnant one and is therefore, void. It was also laid down that if however the intention expressed or to be necessarily implied is to extinguish the absolute estate on the happening of a contingency and where the effect of the termination of the said absolute estate would not be in violation of any rule of law, the clause is a defeasance clause and would operate according to its tenor. This judgment was followed in Scaria Korah of Thayil v. Korah Mathu of Thayil [AIR 1962 Ker 323].

25. In Ramachandra Shenoy v. Mrs. Hilda Brite [AIR 1964 SC 1323], the Apex Court held that it is one of the cardinal principles of construction of wills that 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. It is also held that 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. It is also held that in the matter of construction of a will, authorities or precedents are of no help as each will has to be construed on its own terms and in the setting in which the clauses occur.

26. In Karutha Panicker Raghava Panicker v. Ammukutty Amma Chandrika Bai [ILR 1989 (1) Ker 324], the question considered was whether there was absolute bequest or only a life interest. In that context,

the principles that govern interpretation of a will and the manner in which section 88 of the Indian Succession Act should be interpreted were explained in paragraphs 6 to 9 of the judgment, which reads thus:

"6. Both sides are claiming under Ext.A-1. What is involved is only construction of its provisions. The combined effect of the various relevant provisions in the Indian Succession Act regarding construction of a Will by its interpretation is that it is the duty of the court to find out the real intention of the testator. It is that intention that has to be given effect to. That intention has to be gathered from the language used by him because his wishes could be understood from his words alone. When meaning of the words are affected by surrounding circumstances, those circumstances also will have to be taken into consideration. The meaning of any clause cannot be taken in isolation but to be collected from the entire instrument. All the parts of the Will are to be construed with reference to each other so as to form a consistent whole, if possible. When that is not possible the latter part must prevail. The construction should be as if to give to every expression some effect rather than that which would render any of the expressions inoperative. For that purpose the court is entitled to put itself

into the arm chair of the testator and is bound to consider his family relationship, probability of words being used in a particular sense etc. Those considerations are only to be used as aids. In reading the Will and its provisions as a whole and giving effect to all of them to the extent possible, apparently conflicting dispositions should be reconciled by giving effect to every word used in the document instead of cutting down the clear meaning of words used by the testator. When one of the two reasonable constructions would lead to intestacy that should be discarded in favour of a construction which does not create such a result. If it is legally possible, effect should be given to every disposition contained in the Will unless any provision of law prevents so doing. These are the fundamental guiding factors in the construction of a Will. In short, courts will have to go to the farthest extent to avoid repugnancy and giving effect to each and every testamentary intention in the Will. See *Ramachandra v. Hilda Brite* AIR 1964 S.C. 1323, *Rameshwar Bakhsh v. Balraj Kumar* AIR 1935 P.C. 187 and *Navneet Lal v. Gokul* AIR 1976 S.C. 794.

7. If there are two repugnant provisions conferring successive interests and if the first interest created is legally valid, the subsequent interest created cannot take effect. But such a construction also has to be only when the attempt to avoid repugnancy fails. When an absolute estate is created by a Will in favour of a devisee,

the clauses in the Will which are repugnant to such an absolute estate cannot cut down the estate, but they must be held to be invalid. In such a case the provisions of section 88 of the Succession Act, that the last of the two irreconcilable clauses Will prevail, has no operation because the first clause created an absolute estate and the second one places restrictions on it repugnant to the absolute estate created and cannot prevail according to law. In this respect, section 138 of the Indian Succession Act which is almost the same as section 11 of the Transfer of Property Act comes to the rescue of the absolute estate to treat the subsequent direction as non-existent in the eye of law. But in so invalidating the subsequent clause as invalid the courts should always bear in mind the distinction between a repugnant clause and a defeasance clause in the light of the principle that the attempt should always be reconciliatory to the extent legally and factually possible.

8. When there is a bequest to A which is apparently absolute, followed by a gift of the same to B absolutely on or after or at the death of A, A must be prima facie held to take a life interest alone and B an interest in remainder, the apparent absolute estate of A being cut down to accommodate the interest created in favour of B. Such a construction must necessarily be given to compromise the two clauses because if the first clause is treated as a life interest the second is

according to law perfectly valid. Sections 131 and 134 of the Indian Succession Act are relevant in that respect.

9. The distinction between a repugnant clause and a defeasance clause is rather subtle. When the intention of the testator is to maintain an absolute estate on the devisee, but he simply adds some restrictions in derogation of the incidents of such absolute estate which cannot stand the scrutiny of law for maintenance of the absolute estate, such restrictive clauses would be repugnant to the absolute transfer and hence void. But if the intention expressed or necessarily to be implied, is to extinguish the absolute estate and make it subject to a defeasance on the happening of a contingency and when the effect of such defeasance or termination of the said absolute estate would not be violation of any rule of law, the clause is only a defeasance clause and not a repugnant clause and it would act according to its tenor. In such a case the earlier clause must be considered as conferring only a life interest. When the original estate is thus curtailed on the happening of a contingency or its not happening, and a gift over takes place, it must be held to be valid and operative. That is because the gift over is a valid disposition on the termination of the earlier estate by the death of the devisee or such other contingency provided for. Everything depends upon the intention that is gatherable and the possibility of reconciling the provisions

instead of making one in effective. Such a reconciliation is possible even if the earlier provision conferred an apparently absolute estate and there is no legal bar in treating the subsequent provision as not repugnant but only as a defeasance clause. Sections 28 and 31 of the Transfer of Property Act and sections 131 and 134 of the Indian Succession Act are relevant in that respect see *Gopalakrishna Pillai v. Kunji Amma* (1996 KLT 1092), *P.Krishna v. Narayana* (AIR 1962 Kerala 322), *Scaria Korah v. Korah Mathu* (AIR 1962 Kerala 323), *Govindaraja v. Mangalam Pillai* (AIR 1933 Madras 80), *Rameshwar Kuer v. Shiolat* (AIR 1935 Patna 401), *Golak Behari v. Suradhani Dassi* (AIR 1939 Culcutta 226), *Antony Thommen v. Thommen Alexander and another* (1965 II KLR 283). The real question is the intention of the testator, whether he created an absolute estate and wanted to restrict it by an invalid, repugnant provision which is not legally operative or whether he wanted to terminate or extinguish the apparently absolute right on the happening or non-happening of an event. In the former case the clause is void as repugnant to the estate created, but in the latter it is valid and it is only a defeasance clause. Section 131 of the Indian Succession Act provides for a gift over and section 134 deals with extinguishment of the right without gift over. In either case the effect of the defeasance clause is cutting down the estate."

27. Similar principles have been laid down by the Apex Court in Kaivelikka Ambunhi (dead) by LRs. v. H. Ganesh Bhandary [AIR 1995 SC 2491], where, it was held thus:

"3. The rules of interpretation of the "Will" are different from the rules which govern the interpretation of other documents say, for example, a 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 an earlier occasion. Undoubtedly, it is the last Will which prevails.

4. 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. This is regulated by the well known

maxim "cum duo inter se pugnancia reperiuntur in testamento ultimum ratum est" which means that if in a Will there are two inconsistent provisions, the latter shall prevail over the earlier (See : Hammond v. Treharne, (1938 3 All ER 308).

5. This principle is also contained in Section 88 of the Indian Succession Act, 1925 which, together with its illustrations, provides as under :-

"The last of two inconsistent clauses prevails :-

Where two clauses or 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 benefit of B, the latter disposition will prevail."

6. It may, however, be pointed out that this rule of interpretation can be invoked only if different clauses cannot be reconciled. (See : Rameshwar v. Balraj, AIR 1935 PC 187)."

28. These principles were reiterated by the Apex Court in its judgment in Shyamal Kanti Guha (D) Thru.

L.Rs. v. Meena Bose [2008 KHC 4812] where, in paragraph 10, it was held thus:

"10. In Ramachandra Shenoy and Anr. v. Mrs. Hilda Brite and Ors. [(1964) 2 SCR 722], clause 3(c) of the Will of an Indian Christian Lady - Mrs. Mary Magdelene Coelho fell for consideration. Noticing the provisions of the Indian Succession Act 10 of 1865, this Court held :

"It was common ground that under clause 3(c) the testatrix intended to confer an absolute and permanent interest on the male children of her daughter, though if the contentions urged by the appellants were accepted the legacy in their favour would be void because there could legally be no gift over after an absolute interest in favour of their mother. This is on the principle that where property is given to A absolutely, then whatever remains of A's death must pass to his heirs or under his will and any attempt to sever the incidents from the absolute interest by prescribing a different destination must fail as being repugnant to the interest created. But the initial question for consideration is whether on a proper construction of the will an absolute interest in favour Severina is established. It is one of the cardinal principles of construction of wills that 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."

The said principle was reiterated in *Navneet Lal alias Rangi v. Gokul and Ors.* [(1976) 1 SCC 630] in the following words :

"8. From the earlier decisions of this Court the following principles, inter alia, 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. {*Ram Gopal v. Nand Lal* [1950 SCR 766]}.

(2) In construing the language of the will the court is entitled to put itself into the testator's armchair [*Venkata Narasimha v. Parthasarathy* (1915) 41 Ind App 51 at p. 72] 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. [*Venkata Narasimha's case* (supra) and *Gnanambal Ammal v. T. Raju Ayyar* (1950 SCR 949, 955)].

(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 [Raj Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer (1953 SCR 232, 240)]

(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 favour of a construction which does not create any such hiatus. [Pearey Lal v. Rameshwar Das (1963 Supp. 2 SCR 834, 839, 842)].

(5) It is one of the cardinal principles of construction of wills that 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. {Ramachandra Shenoy v. Mrs. Hilda Brite [(1964) 2 SCR 722, 735]}"

29. From the above principles, it is pellucid that the primary endeavour of the court shall always be to interpret the will in such a manner as to reconcile the provisions contained therein and thus to give effect to the intention of the testator in its letter and spirit and the proper rule of construction is that all the parts of a will should be construed in relation to each other and so as, if possible, to form one consistent whole. In so far as section 88 of the Indian Succession Act is concerned, the said provision can apply only if two gifts or two clauses contained in the will are irreconcilable and cannot possibly stand together, in which event, the last one will prevail. Bearing in mind the above general principles available in the judgments referred to, we

shall again examine the contents of Ext.B2 will to see whether the clauses contained therein are irreconcilable and cannot possibly stand together, as contended by the counsel for the appellant.

30.As per clause (4), 8 cents of land and building mentioned therein are bequeathed in absolute terms to Sri.Angelo, son of the testator. However, subsequent recitals in clause (4) would show that the testator has made this bequest subject to the conditions in sub clauses (A), (B), (C) & (D). Thereafter, clause (5), starting with a non obstante clause, has been incorporated in the will stating that notwithstanding clauses 4(A) to 4(C), in the event the land is acquired under the Land Acquisition Act, Angelo shall receive the compensation and that the entire money so received by him should be utilised for the use of his mother and sister. As we have already stated, the absolute bequest of the property to Angelo as contained in clause (4) is subject to clause 4(C). By this provision, during the life time of Eleshwa and Thresa, they were given absolute right to sell, alienate or transfer any interest or dispose of the

property and the building. The one condition that is required to be complied with for exercising the rights under clause 4(C) is that written consent of Angelo should be obtained and that he should also be a party to the document. Reading of sub clauses to clause (4) of the will would show that though vide clause 4(C), a bequest has been made in favour of the wife and daughter of Sri.T.A.Joseph, since the absolute bequest made to Angelo vide clause (4) is subject to clause 4(C), both bequests can stand together and there is nothing irreconcilable between these two gifts in the will. According to us, clause (4) being subject to 4(C), clause 4 (C) would operate as a proviso to clause (4). By understanding the provisions of the will in that manner, full effect can also be given to intention of the testator and repugnancy can also be avoided. Therefore, we are not satisfied that this is a case to which section 88 of the Indian Succession Act, requiring total irreconcilability between two provisions of a will, is attracted. For that reason, we are unable to sustain the contention raised by the learned counsel for the appellant relying on section 88 of the Indian

Succession Act to invalidate the bequest contained in clause (4) of Ext.B2. Since we have rejected the contention of the appellant that clause 4(C) contains an irreconcilable bequest, we do not find it necessary to deal with the contention of the appellant regarding the invalidity of the other conditions contained in clause 4(C) in view of the provisions contained in section 10 of the Transfer of Property Act and section 138 of the Indian Succession Act. For that reason itself, it is unnecessary to deal with the judgments in Jagat Singh v. Sangat Singh [CDJ 1940 PC 026], [2010 KHC 6797], Ittiyachan v. Tomy [2001 (3) KLT 117] relied on by the counsel in this context.

31. In the aforesaid circumstances, we are unable to see any illegality in the judgment and decree of the trial court. The appeals are without merit and are accordingly dismissed.

However, considering the fact that the appellant herein has been residing in the plaint schedule property in O.S.80/11, at her request, we allow her

three months' time from today to surrender vacant possession of the plaint schedule property to the respondent decree holder.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
P.V.ASHA, Judge.

k kb.

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PS to Judge