

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 845 OF 2023
WITH
INTERIM APPLICATION (ST) NO. 12905 OF 2023

1. Rodney Medard D'Silva,	}	
age-70 years	}	
	}	
2. Luan Rodney D'Silva	}	
age-34 years.	}	
	}	
Both residing at Flat No. 1, Ground	}	Appellants (orig. Defendants)
floor, Kelhaven, Pitamber Lane,	}	
Mahim, Mumbai-400 016.	}	
V/s.		
1. Stephen Fredric D'Silva	}	
Age-65 years.	}	
	}	
1(a) Mrs. Cynthia Stephen D'Silva	}	
(deleted)	}	
	}	
1(b) Mr. Leonard Stephen D'Silva	}	
Age-27 years, Occu-Service.	}	
	}	
2. Dennis Trevor D'Silva	}	
(Permanently residing at Canada age	}	
63 years, All plaintiffs residing at	}	
Flat No.4, 1 st floor, Kelhaven,	}	 Respondents (orig. Plaintiffs)
Pitamber Lane, Mahim, Mumbai-400	}	
016.	}	

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Mr. Nenobia Irani/Nair and Mr. Prashant Tikare, for the appellants.

Mr. Satyaran N. Vaishnav with Ms. Nupur J. Mukherjee with Mr. Armaan Grewal, I.by M/s. N.N. Vaishnawa and Co. for respondent no. 2.

CORAM : KISHORE C. SANT, J.

RESERVED ON : 4TH MARCH 2024.

PRONOUNCED ON : 7TH MAY 2024.

JUDGMENT: (PER KISHORE C. SANT, J)

1. This appeal by the original defendant nos.1 and 2 against the original plaintiffs challenging the judgment and decree dated 18/03/2023 passed by learned Judge, City Civil and Sessions Court, Greater Mumbai in S.C Suit No. 3825 of 2008.

2. Learned Judge decreed the suit with costs and directed the present defendants to put the plaintiffs in possession of the suit flat i.e. flat no. 1, situated on ground floor, Kelhaven, Pitamber Lane, Mahim, Mumbai-400 016. For the convenience, the parties are referred to as per their original suits.

3. The case in short is that, the original plaintiffs and original defendant no. 1 are the brothers. The original plaintiff no. 2 resides in Canada and visits India occasionally. Till 2002 he was working in Kuwait. However, his wife and son were continuously residing in Mumbai. The plaintiffs and defendant no.1 are sons of late Dr. Lewis D'Silva who expired in 1979 leaving behind various properties

including the suit flat. The deceased father had made a Will in the year 1972 and the said Will was probated by appellant/defendant no. 1 along with others by filing Testamentary Petition No. 30 of 1981. It is the case of the Plaintiffs that they were appointed as beneficiaries of the suit property and income of the building was to be shared by the plaintiffs in two equal shares. However no right to sell or mortgage the said building known as Kelhaven was given to the plaintiffs. The entire building is a tenanted property consisting of 6 flats. The dispute is only about the suit flat. The suit flat was also rented to one Mr. Edgar D'Mello and after his death Mrs. Edith D'Mello, his wife was accepted as tenant who used to pay the rent. After the death Mrs. Edith D'Mello her sister who was residing with her continued to occupy the said flat as the occupant and paid rent till her death i.e. till 12/01/2008. She expressed her desire before her death that after her death the suit flat should go back to the plaintiffs after two months of her death. This was informed to her lawyer and the owners.

4. Sister of Mrs. Edith died. At the relevant time Plaintiff no. 1 was not keeping well, Plaintiff No. 2 was residing in Canada and he was to come to Mumbai to take possession of the suit flat. The lawyer of the tenant was to hand over possession on 21/03/2008 of the suit

flat to the defendants. However, before that could happen, the defendants broke open the lock and put his lock on 8th March 2008. The complaint therefore came to be lodged by niece of tenant. The lawyer of the tenant also lodged a complaint with the police vide letter dated 12th March 2008. On complaint, the police broke open the lock put up by defendants. The defendants however again took possession of the suit flat forcefully in the night of 8th March 2008.

5. It is thus the case of the plaintiffs that they are also beneficiaries of the suit property. Defendants without any right, title or interest took the possession of the suit property. The plaintiffs are deprived of income from the suit flat. Defendant no. 1 is the eldest brother and he paid the taxes in respect of the adjoining property being Sylvan Apartments Co-Op. Housing Society Ltd. The defendant no. 1 was therefore, permitted by the plaintiffs to recover the rent of the suit property also and pay taxes on behalf of the plaintiffs. Thus, looking at the action of defendant no. 1., plaintiffs apprehending that the defendants may take forcible possession of other vacant premises in Kelhaven Building, bearing Flat Nos. 5 and 6 which were locked and lying in vacant condition. There are 2 garages on the ground floor which were also lying in locked condition. The defendants tried to grap

all the properties by using muscle power. The plaintiffs, therefore, filed a suit for declaration that the defendants have no right, title and interest in the suit premises and sought a decree by ordering the defendants to hand over the vacant and peaceful possession of the suit flat and from creating 3rd party interest. Prayer was also made to appoint the Receiver of suit premises.

6. It is the case of the defendants that deceased Dr. Lewis D'Silva had executed a Will and after death of Lewis D'Silva they initiated proceedings to obtain the probate of the Will. However executors Mrs. Mary D'Silva died during pendency of the said probate proceedings. Defendant No. 1 Mr. Rodney D'Silva, surviving executors obtained probate by filing Testamentary Petition No. 30 of 1981 by order dated 21st May 1992. Notices were served on all the heirs of Dr. Lewis D'Silva. No challenge the contents of the Will were raised. Defendant No.1 thus obtained probate and became co-owner along with the plaintiffs. Total 6 flats and 3 garages are owned jointly by the plaintiffs and defendants. Being co-owners the plaintiffs and defendants are entitled to get 2 flats and 1 garage each in the said building. Plaintiff being co-owner occupied flat no. 4 of the said building. Defendant no. 1 also occupied the same flat as co-owner of

the said building. It is further case of the defendant that in the year 2007, the building known as Sylvan Home in which defendants were residing became dilapidated and therefore, they shifted in flat no. 4 in Kelhaven Building. He also initiated proceedings against the occupant of the flat no. 4 in the Small Causes Court for eviction. He got possession by filing the consent terms. He had thus paid huge amount in the litigation. That plaintiff no. 1 illegally and forcibly entered in flat no. 4, therefore the defendant no. 1 could not shift in the said flat no. 4 and the defendants were not having any other premises except flat no. 3 of Sylvan Home and for this reason defendant no. 1 called upon by the tenant in the suit building to vacant flat. He opposed suit.

7. Learned trial Court held that the plaintiffs proved that they are the beneficiaries of flat no. 1 of the suit building. Defendants have no legal right to occupy the suit flat. It is however held that the plaintiffs are entitled take possession of the suit flat from defendants. It is held that defendants have failed to prove that they are entitled to get share in the suit flat on the strength of clause 5(d) of the Will executed by Dr. Lewis D'Silva. It is held that defendant no. 1 is the co-owner of the suit building along with plaintiffs. The trial Court allowed the suit directing the defendants to hand over vacant and peaceful possession

of the suit flat.

8. Challenging this Judgment the original defendants are before this Court. The appeal is mainly on the ground that the Court has not properly framed the issues. The issues are against pleadings. The Court has not properly considered the contents of the Will and has failed to interpret clauses of the Will. The plaintiffs were given only right to get income from the suit property subject to condition that the flat shall never be sold or mortgaged, it does not give any ownership rights to the plaintiffs. To resolve dispute it is necessary to see contents and the clauses of Will in the light of section 88 of the Indian Succession Act, which reads as below:

“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”.

9. Considering the clauses after of the deed, it is clear that the right is given to the plaintiffs only condition that not to sell and mortgage the suit property. He also criticize the conduct of the defendants from his cross-examination, where he accepted that he was residing in flat no. 4 at Sylvan Home, the said building is completely demolished. In the cross-examination the defendants accepted that the

plaintiffs were entitled to rent income and benefit of suit premises.

10. The parties relied upon the judgment reported in the case of *“Uma Devi Nambiar and Ors. vs. T.C., Sidhan (dead)”*¹, wherein the Hon’ble Supreme Court has considered Section 88 of the Indian Succession Act. It was also observed that a Will may contain several clause and the latter clause may be inconsistent with the earlier clause and in the case of *“Martin & Harris (P) Ltd. & Anr. Vs. Rajendra Mehta and Ors.”*² In such a case it is later clause of the Will which would prevail.

11. The controversy in the case is about inconsistency in two clauses of the Will of late Dr. Lewis D’Silva. This Court has considered the judgment in the case of *“Umadevi Nambiar & Ors. Vs. T.C. Sidhan (dead)”*³. After considering all these things, this Court finds that the trial Court has rightly considered that the later clause in the Will would prevail in case there is inconsistency between two clauses of the Will. This Court does not find any illegality in the order passed by the learned Trial Judge. There is no merit in the Appeal. The Appeal is, therefore, dismissed. No order as to costs.

1 (2004) 2 SCC 321

2 (2022) 2 SCC 527

3 (2004) 2 SCC 321

12. In view of disposal of appeal, nothing survives in the interim application, the same is also disposed of.

13. At this stage, learned advocate for the applicant seeks continuation of the interim relief this was continued during the appeal for eight weeks. Learned advocate for the respondent opposes the said prayer. However, considering that interim relief was operating during the pendency of the appeal, the same is continued for eight weeks.

(KISHORE C. SANT, J)