

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION**

INTERIM APPLICATION NO. 2222 OF 2023

IN

TESTAMENTARY PETITION (LODGING) NO. 1751 OF 2022

Dhananjay Madhukar Salgaonkar & Anr. ...Applicants

IN THE MATTER BETWEEN :

Dhananjay Madhukar Salgaonkar & Anr. ...Petitioners

Versus

Parashar Vishwas Sapale & Ors. ...Respondents

WITH

TESTAMENTARY PETITION (LODGING) NO. 1751 OF 2022

Nandkumar Krishnaji Sapale ...Deceased

Dhananjay Madhukar Salgaonkar & Anr. ...Petitioners

WITH

INTERIM APPLICATION NO. 2748 OF 2023

IN

TESTAMENTARY PETITION (LODGING) NO. 1751 OF 2022

Nandkumar Krishnaji Sapale ...Deceased

Dhananjay Madhukar Salgaonkar & Anr. ...Petitioners

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- Mr. Tejas Vora i/b D.R. Mishhra, for applicant / Petitioners.
- Mr. Farhan Dubash a/w Ms. Harshal Manik and Ms. Shruti Bedekar i/b Mr. Ajay Basutkar, for Respondent No.2.

* * *

CORAM : MANISH PITALE, J.

DATE : 29th APRIL, 2024.

ORDER:

1. This testamentary petition is filed by the petitioners for grant of Letters of Administration with a copy of a purported Will dated 21st May, 2013. In this petition, interim applications were filed,

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which are pending. Interim Application No. 2748 of 2023, is filed on behalf of the petitioners seeking dispensation of preliminary objection raised by the department, as to how the subject document titled as “family arrangement” can be treated as a “Will”. Interim Application No. 2222 of 2023, is filed by the petitioners seeking interim directions during the pendency of the testamentary petition.

2. The respondent No.2 in Interim Application No. 2222 of 2023, has appeared through counsel. The learned counsel appearing for the petitioners submits that since the preliminary objection pertains to an issue between the petitioners and the department, the learned counsel for respondent No.2 ought not to be heard by this Court.

3. The petitioners claim that the document titled as “family arrangement” dated 21st May, 2013, at Exhibit “B” to the petition, is the last Will and testament of the deceased – Nandkumar Krishnaji Sapale and that the petitioners are entitled to grant of Letters of Administration with Will annexed, having effect throughout the State of Maharashtra. The petitioners claim to be the trustees of two trusts settled by the deceased during his lifetime and, according to them, paragraph Nos.20 and 21 of the document at Exhibit “B” constitute the last Will of the deceased, who was signatory to the said document, being described as party of the first part in the said document.

According to the learned counsel for the petitioners, as per the settled position of law, since paragraph No.21 of the aforesaid document at Exhibit “B” brings out the intention of the deceased as to the manner in which his share in the property is to be dealt with, it constitutes the last Will and testament of the deceased.

4. The respondent No.2 in Interim Application No. 2222 of 2023, is one of the persons described as party of the fifth part in the said document at Exhibit “B” and the learned counsel appearing for respondent No.2 claims that the said document at Exhibit “B” is nothing but a family arrangement and no part of the same can be treated as the last Will and testament of the deceased. Although, learned counsel for the petitioners objected to respondent No.2 being heard through counsel, this Court is of the opinion that assistance of the counsel can be taken in order to construe and interpret the document at Exhibit “B”, in order to test as to whether the preliminary objection raised by the department can be dispensed with.

5. The department has asked the petitioners to explain how the document at Exhibit “B” i.e. family arrangement dated 21st May, 2013, can be treated as the last Will and testament of the deceased. In order to examine the same, the document will have to be perused and interpreted, as the aforesaid question goes to the very root of the

matter, upon which depends the very exercise of jurisdiction by this Court for considering the petition for grant of Letters of Administration with the copy of the purported Will.

6. Before advertng to the contents of the said document at Exhibit “B”, it would be appropriate to refer to the position of law as regards what can constitute a “Will”. It is obvious that substance must prevail over form and mere nomenclature of the document cannot decide the true nature of the document. Thus, merely because the document at Exhibit “B” is titled as family arrangement, it is cannot lead to a conclusion that the same can never be interpreted as a Will of the deceased.

7. In this context, it would be appropriate to refer to judgments of the Supreme Court. Instead of referring to a plethora of judgments, this Court finds it fit to refer to the judgment of the Supreme Court in the case of *Navneet Lal alias Rangi Vs. Gokul and others*¹. The Supreme Court in the said judgment culled out well established principles for determining as to whether a document could be said to be a Will. The Supreme Court in the aforesaid judgment held in paragraph No.8 as follows :

“8. *From the earlier decisions of this Court the following principles, inter alia, are well established :*

(1) *In construing a document whether in English*

¹ (1976) 1 SCC 630

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, 772 : AIR 1951 SC 139)

- (2) *In construing the language of the will the court is entitled to put itself into the testator's armchair (Venkata Narasimha v. Parthasarathy, 41 IA 51, 72 : 21 IC 339 : 15 Bom LR 1010) 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 : AIR 1951 SC 103]*
- (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 : AIR 1953 SC 7)

- (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 : AIR 1963 SC 1703.)
- (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 interest, 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. (Ramchandra Shenoy v. Mrs. Hilda Brite, (1964) 2 SCR 722, 735 : AIR 1964 SC 1323.

8. In the subsequent judgment in the case of *Mathai Samuel and others vs. Eapen Eapen (dead) By Lrs & others*², the Supreme Court dealt with a document to examine as to whether it was a settlement creating vested rights in favour of the parties or it also discussed testamentary disposition. The entire document was taken into consideration and it was found that the document was composite in character, parts of which were found to be having special features of a testamentary disposition. Hence, some parts and schedules of the document were held to be testamentary dispositions. The Supreme Court held that a document which operates to dispose of property *in praesenti* in respect of few items of the properties is a settlement and in future in respect of few other items after the death of the executants, it is a testamentary disposition. While reaching such conclusion about a composite document, the Supreme Court referred to the definition of Will under Section 2(h) of the Indian Succession Act, 1925 (Succession Act) and held that the three essentials of a Will are, that it must be a legal declaration of the testator's intention; such declaration must be with respect to his property; and the desire of the testator must be evident that the said

² (2012) 13 SCC 80

declaration should be effectuated after his death. Section 2(h) of the Succession Act, defines Will as follows :

“Section 2(h) : ‘Will means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.’”

9. The learned counsel for the petitioners submits that in the present case also, the document at Exhibit “B” is a composite document, part of which indicates a family arrangement, while paragraph Nos.20 and 21 thereof, clearly indicate the manner in which the share of the deceased is to be dealt with in future, thereby indicating that the said part of the document is a testamentary disposition. Hence, the present petition filed for grant of Letters of Administration with Will annexed in the context of the document at Exhibit “B”, is clearly maintainable. On this basis, it is submitted that the preliminary objection raised by the department ought to be overruled and dispensed with.

10. The learned counsel for respondent No.2 in Interim Application No. 2222 of 2023, submitted that a proper reading of entire document at Exhibit “B” and reading paragraph Nos.20 and 21 thereof together would indicate that the said document is nothing but a family arrangement and it cannot be construed as a testamentary disposition. On this basis, it is submitted that the preliminary objection raised by the department is justified.

11. In the light of the position of law noted hereinabove, this Court has perused the document at Exhibit “B”. It is titled as family arrangement dated 21st May, 2013. The deceased and other members of the Sapale family are signatories to the said document. The deceased is described as the party of the first part and there are further parties from second to the fifth part. The document opens by referring to a consent decree passed by this Court in Suit No. 18 of 1985. The document traces the journey of the said litigation in the form of an appeal before this Court and eventually it is recorded that the parties to the said document were the auction purchasers of the property, which was an ancestral property acquired by the father of the deceased and the predecessors of the other signatories to the document. Paragraph Nos. 14 and 15 of the recitals of the said document, read as follows :

“14. The said property is an ancestral property acquired by late Shri Krishnaji Narayan Sapale i.e. father of the Parties of First, Second and Third Parts and grandfather of the Parties listed at serial No.5(b) and 5(c) and party of the Fourth Part and father-in-law of the party listed at Serial No.5(a). All the parties have at the time of acquiring the said property, acquired the same with the sole object of keeping the said property for the use and benefit of all the parties to keep the memory of their parents/grand parents viz. Krishnaji Narayan Sapale and Rukminibai Krishnaji Sapale alive.

15. *The Parties, with a view to continue the said object of retaining the said property within the Sapale family and to ensure that the same is not in any way affected by any individual problems of the members of Sapale family including the parties hereto and their family members, the parties hereto are desirous of entering into this Deed by which the terms and conditions on which the parties have agreed to hold the said property, have been clearly defined and set out.*

12. Thereafter, the document records the actual family arrangement agreed between the signatories, wherein the deceased was described as party of the first part. The percentages of the ownership of the property were recorded, indicating that the deceased had a larger percentage i.e. 30%, while the parties of the second to the fifth part had 15% each, with the remaining 10% going to the K N Sapale HUF. The terms of the family arrangement indicate that the deceased did have a higher status than the others, but in the event of differences regarding control and management of the property, the same were to be resolved through a decision of the majority of the parties to the document. Even if the deceased as the party of the first part was to manage the property, he could take major decisions only with the approval of the majority of the parties to the said document. In case of a tie, the deceased had a casting vote. In this backdrop, it would be appropriate to now to consider most crucial paragraphs of the said document, which read as follows :

“20. The Party of the First Part shall be entitled to deal with his share in the said property in such a manner as the Party of the First Part deems fit as per his sole discretion or desire. **Provided** that the Party of the First Part shall not at any time transfer / sell his share, right, title and interest in the said property to any third Party. However, the party of the First Part shall be entitled to create a trust relating to his share in the said property to ensure that the benefits arising out of the said property are at all times available for the use, up keep and maintenance of the said property and keep alive the memory of Late Shri. K.N. Sapale and Late Smt. Rukminibai K. Sapale and for the welfare and benefit of the parties hereto and other members of the Krishnaji Sapale Family. The Party Nos. 2nd to 5th Part agree at all times to honour the wishes of the party of the First Part. **Provided further** that the same are not in any manner contrary to and/or inconsistent with the purposes and objects of this Family Arrangement / Settlement.

21. In the event of the demise of the party of the First Part, the share of the First Part shall be dealt with in the manner as may be dealt with by the party of the First Part during his lifetime by creating a trust or such other entity as the party of the First Part may have created during his lifetime and/or as per the Last Will and Testament of the Party of the First Part. In the event, no such trust is created and/or Will is left behind by the Party of the First Part, the share of the First Party shall devolve equally upon the party of the 2nd to 5th Part, with each of them having 1/4th share therein. It is clarified that the Party of the Fifth Part shall be jointly entitled to

1/4th share. Upon the demise of any of the Party namely Party of the 2nd to 5th Part, their share in the said property shall devolve upon their heirs as per law or in case the Party leaves behind a Will, the said property shall devolve as per the said Will. However, the parties hereto agree that none of the party shall be entitled to deal with his/her share in the said property in any manner whatsoever whereby her/his share is gifted, transferred, assigned and/or bequeathed during their lifetime or after their demise to any person/persons outside the Krishnaji Sapale Family which include descendants of late Shri. Krishnaji Sapale and/or their spouses. Provided further the share of the spouses shall revert back to the descendants of the Krishnaji Sapale family and not to any of the other heirs of the said spouses.”

13. According to the learned counsel for the petitioners, paragraph No.21 of the document quoted hereinabove, particularly the opening sentence, constitutes a testamentary disposition and hence, it is the last Will and testament of the deceased. It is emphasized that the said document is indeed signed by the deceased as the party of the first part and two witnesses have also signed the said document, thereby indicating the aforesaid part of the document at Exhibit “B” constitutes the Will of the deceased.

14. It is necessary to read the entirety of the document and in that context appreciate the true purport of paragraph Nos.20 and 21

thereof quoted hereinabove. Paragraph No.20 of the document shows that the deceased was entitled to deal with his share in the property as he deemed fit, as per his sole discretion or desire, provided that he would not transfer or sell his share, right, title and interest in the property to any third party. He was entitled to create a trust relating to his share in the said property, to ensure that the benefits arising out of the property were at all times available for the use, upkeep and maintenance of the said property and to keep alive the memory of his parents and for the welfare and benefit of the parties thereto and other members of the Krishnaji Sapale family. It was also specified that the parties of the second to fifth part would at all times honor the wishes of the party of the first part i.e. the deceased, provided further that such wishes were not in any manner contrary to the objects of the family arrangement / settlement.

15. Paragraph No.21 of the said document provides that upon the demise of the deceased his share would have to be dealt in the manner as the deceased could have dealt with during his lifetime by creating a trust or such other entity. It is crucial that the opening sentence of the said paragraph further provides that the share of the deceased shall be dealt with by creation of such a trust and /or as per the last Will and testament of the deceased. Thereupon, it is stipulated that if no such trust is created and / or a Will is left behind by the deceased, his share would then devolve equally upon the

parties of the second to the fifth part, with each of them getting 1/4th share therein.

16. The opening sentence of paragraph No.21, does indicate the manner in which the share of the deceased is to be dealt with after his death. But, it is necessary to read paragraph Nos.20 and 21 together, for the reason that after the death of the deceased his share could be dealt with by creating a trust, as the deceased could have created during his lifetime and /or as per the last Will and testament of the deceased. Thus, the very document at Exhibit “B” in paragraph No.21 contemplates that the deceased could have executed a last Will and testament, which could divulge his wishes as to the manner in which his share in the property was to be dealt with after his death. In other words, this document records that the deceased could have executed his last Will and testament.

17. It is significant that paragraph No.20 of the said document specifies that the deceased could deal with his share as per his desire, but he could not transfer or sell his share to any third party. He could create a trust in respect of his share in the property, but such a trust would be to ensure that the benefits arising out the property are at all times used to maintain the property and to keep alive the memory of the parents of the deceased and further for the welfare and benefit of the parties to the document and other members of the Krishnaji

Sapale family. The parties of the second to fifth part of the document were enjoined to honour the wishes of the deceased, so long as, they were not contrary to and inconsistent with the purposes and objects of the family arrangement/settlement. The object of the said document is evident from paragraph No.15 of the recital quoted hereinabove.

18. In this context, when the deeds of trust, on the basis of which the petitioners claiming to be trustees of the trusts have approached this Court, are perused, it is found that the objects of the said trust are not in-consonance with the stipulations in the aforesaid document at Exhibit "B" i.e. the family arrangement, particularly in paragraph No.20 thereof. Although the two trusts are in the name of the parents of the deceased, there is nothing to indicate that the share of the deceased in the property was put to use and crucially the said trust deeds do not show that they were meant for ensuring the up keep and maintenance of the property concerning the family arrangement and that the trusts were for the welfare and benefit of the parties to the family arrangement and other members of the Krishnaji Sapale family. The said trusts have been registered as Charitable Trusts under the orders of the office of the Charity Commissioner. The orders granting such registrations passed by the Assistant Charity Commissioner are placed on record with the present petition, which significantly show that there is no immovable

property of the trust at the time of registration and only movable property of Rs. 1,000/-. The objectives of the two trusts do not indicate that these trusts were created by the deceased in terms of what was contemplated in paragraph No.20 of the family arrangement i.e. the document at Exhibit "B" quoted hereinabove.

19. The petitioners herein as trustees of the said two trusts in these circumstances cannot claim to be trustees of the trust as contemplated in the said document and hence, they cannot file this petition as representing the interest of the beneficiary under the bequest. There is no last Will or testament left behind by the deceased as contemplated in paragraph No.21 of the said family arrangement and if at all the testamentary disposition has to take effect, it would have to be in the form of creation of a trust as the deceased could have created as per paragraph No.20 of the said family arrangement for the up keep and maintenance of the property, which is subject matter of the family arrangement and for the welfare and benefit of the signatories to the family arrangement and other members of the Krishnaji Sapale family. The petitioners herein claiming to be trustees of the said two trusts are, therefore, having no locus to file the present petition and at their behest the aforesaid document at Exhibit "B" cannot be treated as the last Will and testament of the deceased. In fact, it is not the case of even the petitioners that the deceased did leave behind a last Will or testament

as contemplated in paragraph No.21 of the family arrangement. As per the principles culled out by the Supreme Court, quoted hereinabove, the surrounding circumstances must be considered and the document in question must be construed as a whole. The document at Exhibit "B", read as a whole, does not show that it pertains to testamentary disposition of the deceased.

20. In these peculiar circumstances, even if the position of law as noted hereinabove, as regards the ingredients of a Will is to be applied, the present petition as a petition for grant of Letters of Administration with Will annexed, at the behest of the petitioners, claiming to be trustees of the said trusts, cannot be maintained. Hence, Interim Application No. 2748 of 2023, is dismissed. The preliminary objection raised on behalf of the department is sustained.

21. As a consequence, testamentary petition filed by the petitioners is held to be not maintainable and accordingly it is dismissed. Consequently Interim Application No. 2222 of 2023, also stands dismissed.

(MANISH PITALE, J.)