

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : PROPERTY RIGHTS

RFA No. 34/2006

Pronounced on : September 20, 2007

Kanwal Krishan

.....Appellant

through : Mr. Sudhir Chandra, Sr. Advocate
with Mr. Deepak Nag and
Mr. Bhagwati Prasad, Advocates

VERSUS

Raj Kumar Gupta & Anr.

.....Respondents

through : Mr. Chetan Sharma, Sr. Advocate
with Mr. Pramod Jalan, Advocate

CORAM :-

* THE HON'BLE MR.JUSTICE A.K.SIKRI
THE HON'BLE MS. ARUNA SURESH

A.K. SIKRI, J.

1.Dispute in this case relates to the rights over the terrace of property No. B-1/13, Hauz Khas, New Delhi. The appellant, who was the plaintiff in the court below, is the resident of ground and second floor of the said property (hereinafter referred to as the 'suit property'). The respondents herein (both of whom were the defendants in the suit) are the owners of first floor of the property. Shri Tara Chand Gupta was the absolute owner of the entire suit property. During his lifetime, he had executed Will dated 4.8.1984 whereby he bequeathed the suit property to his three sons, namely, Shri Lalit Chand Gupta, Shri Raj Kumar Gupta (respondent No.1 herein) and Shri Kanwal Krishan (appellant). The particular shares in the said property delineated by virtue of the Will in favour of the three sons were as under :-

“A. Portion 'A' – Ground Floor (Shri Lalit Chand Gupta)

Front part of Ground Floor comprising the following :-

1. Drawing and Dining Room
2. Attached Kitchen
3. Attached bathroom
4. Attached inside covered verandah measuring $10\frac{1}{4}$ ft X $5\frac{1}{2}$ ft. (after bifurcation) and 5 ft. front thereof
5. Front verandah
6. Attached servant's quarter underneath the stair-case
7. Front lawn
8. Roof of the constructed portion of the house of the first floor except one small bath-room ($3\frac{1}{4}$ ft X $3\frac{1}{2}$ ft) and small adjoining kitchen ($8\frac{1}{2}$ ft X 5 ft) on the front eastern side.
9. Roof of the room on the back open courtyard on the first floor, if and when constructed.

B. Portion 'B' First Floor (Raj Kumar Gupta)

1. Entire first floor excluding the stair-case and the stair-hall.
2. There is a water-tank on the first floor for water for both portions of the ground floor, which shall be kept in tact or shifted else-where on the first floor, if necessary, by the owner of this portion at his own expense.

C. Portion 'C' Ground Floor (Kanwal Krishan)

Back part of ground floor comprising the following :-

1. Two bed rooms.
2. Attached bath rooms
3. Attached inside covered varandah measuring $10\frac{1}{4}$ ft X $7\frac{1}{2}$ ft (after bifurcation) and 5 ft front thereof
4. Store room on the back-side to be used as kitchen.
5. Open latrine on the back side
6. Open pacca courtyard of 14 ft length on the back side adjoining the covered bath-room
7. (Roof on the first floor over the big open courtyard over the main drawing room on the ground floor) if and when constructed. Also roof over the small bathroom ($3\frac{1}{4}$ ft X $3\frac{1}{2}$ ft) and the small adjoining kitchen ($8\frac{1}{2}$ ft X 5 ft) on the eastern side which already stands constructed on the first floor.

D. Portion 'D' Ground Floor, and other Floors (Common)

1. Portion comprising the common entrance in the front, the porch, and the open courtyards towards the South and back courtyard other than the portion indicated in C(6) above.

2. Stair-case and stair-hall on all floors.”

2. The three sons kept in occupation of their respective portions of the property as per the Will in the aforesaid manner. As is clear from the above, the appellant is given the back/rear portion of the ground floor and Shri Lalit Chand Gupta the front portion of the ground floor. The respondent No.1 kept the entire first floor. The property was constructed upto the first floor and above the first floor, i.e. the second floor, construction was partly carried out. That was also given to Shri Lalit Chand Gupta and the appellant in equal proportion as per the specific portions mentioned in the Will. Thus, the appellant and Shri Lalit Chand Gupta were given half portion each of the ground floor and half portion each on the second floor, whereas the respondent No.1 was given the entire first floor. Upto this, there is no quarrel or difference of opinion between the parties. The second floor has since been constructed by Shri Lalit Chand Gupta and the appellant. Now the dispute is over the terrace above the second floor.

3. The appellant maintains that by virtue of the Will, all roof rights and space over and above the constructed first floor was to belong to Shri Lalit Chand Gupta and the appellant in its entirety, which would include not only the construction on the second floor, but even the right to construct on the roof of the second floor, i.e. third floor etc. We may also note at this stage that Shri Lalit Chand Gupta transferred, sold and assigned all his rights, title and interest in the ground floor as well as the second floor to the appellant vide registered sale deed dated 14.5.1993. Therefore, the appellant is in possession of complete ground floor as well as the second floor. He intends to make construction on the terrace of the second floor. The respondent No.1 has objection to the same as he states that the rights over the roof above the second floor would belong to all the three sons inasmuch as there was no such stipulation in the Will to give that portion to Shri Lalit Chand Gupta and the appellant by their father.

4. Because of this dispute, the appellant filed suit for declaration and permanent injunction claiming that he is the owner/occupant not only of the ground floor and second floor, but roof on the second floor with terrace rights in the suit property. We have already mentioned the defence of the respondent No.1, to which the respondent No.2 also joined, who is impleaded being the wife of the respondent No.1. Following issues were framed by the learned trial court on the basis of pleadings :-

“1. Whether under the Will dated 17/8/94 executed by Late Shri Tara Chand Gupta the roof rights over the second floor of the suit premises were bequeathed exclusively to the plaintiff and Lalit Chand Gupta? OPP

2. Whether the defendant No.1 is having 1/3rd proportioned share of the terrace of the second floor of the suit property? OPD

3. Whether the plaintiff is sole and absolute owner of the roof over the second floor of the suit premises? OPP

4. Whether Mr. Lalit Chand Gupta has sold out the terrace rights over the second floor of the suit property to the plaintiff? OPP

5. Whether the plaintiff is entitled to the relief as sought?”

5.The appellant examined himself in support of his case, whereas on behalf of the respondents, the respondent No.2 appeared in the witness box. In fact, there is hardly any dispute on the facts and the entire case turns on the interpretation of the Will dated 4.8.1984, which is also an admitted document. The learned trial court vide its impugned judgment and decree dated 26.9.2005 decided the issues in favour of the respondents and against the appellant and, thus, dismissed the suit of the appellant. Aggrieved by this order, the present appeal is preferred by the appellant.

6.Perusal of the impugned judgment would show that the learned trial court was influenced by the fact that in the Will, late Shri Tara Chand Gupta had divided the property into three portions, namely, A, B and C. One part each was given to each of his sons and there was 4th part, namely Part D wherein those portions of the property were mentioned, which were to be used commonly by all the beneficiaries. As per this Will, the appellant got roof rights of the first floor along with his brother Shri Lalit Chand Gupta so as to construct the second floor. There was no mention of the roof/terrace rights over the second floor and, therefore, the appellant could not claim that roof right was given to the occupier of the second floor. He did not agree that the contention of the appellant that roof over the second floor could not have been for common use inasmuch as portions for common use were also specifically stipulated in Part D of the Will. The learned Judge was of the opinion that what had not been bequeathed in the Will shall be deemed to have been left over by the testator to be shared by all the beneficiaries and, therefore, terrace rights over the second floor were for the common use of all the three brothers.

7. Learned counsel for the appellant challenged the wisdom of the trial court and the rationale given by it in coming to the conclusion by making the following submissions :-

a) The testator was aware that respective portions given to the three brothers were not the equal portions. At the time of execution of the Will, ground floor and first floor were fully constructed and second floor was partly constructed. Ground floor was divided into two portions and given to two sons along with half share each on the second floor, which was partly constructed and partly open land. As against this, the respondent No.1 was given the entire first floor which was the only compact portion and the middle portion of the property. The testator was aware of this unequal division and, therefore, to compensate the appellant and Shri Lalit Chand Gupta, the intention was to give terrace rights over the second floor.

b) Property in question was not the joint property and instead the shares were divided. In such a case, there could not have been any presumption about the terrace being for common use in the absence of any stipulation in the Will.

c) It was more so when common portions were specifically demarcated in Part D and it did not include terrace of the second floor.

d) Even under ordinary law, the owner of the second floor would be the person to get terrace rights.

e) The testator has visualised the entire property as constructed. That is the reason that even when the second floor was not constructed, he had divided that between the appellant and Shri Lalit Chand Gupta with right to construct their respective portions. Once second floor is treated to have been fully constructed, the testator would have terrace also in mind and, therefore, it cannot be said that he did not bequeath the said terrace. It was submitted that if the intention of the testator is to be seen in the aforesaid manner, the appellant would be the owner of the terrace above the second floor as per the Will and the Court was supposed to gather the intention of the testator from the Will, as held in *Gnambal Ammal v. T. Raju Ayyar & Ors.*, AIR 1951 SC 103 (para 10).

(f) Learned counsel also relied upon para 8 of the judgment in *Navneet Lal alias Rangi v. Gokul & Ors.*, AIR 1976 SC 794, in support of the proposition that language of the Will was paramount and was to be read as a whole. Therefore, it cannot be said that terrace is common when there is no stipulation in the Will in respect thereof.

8.Learned counsel for the respondents countered the aforesaid submissions by contending that the testator was a retired District & Sessions Judge and, therefore, knew very well the implication of his disposition by virtue of the said Will. He had demarcated the portions bequeathed to his three sons specifically. He knew very well that the right over the terrace is a substantive right and had the intention been to give it to a particular son, he would have specifically stated so in his Will. Therefore, no such derivation can be presumed, as contended by the appellant's counsel. He further submitted that the intention of the testator was to give his three sons equal shares, as far as possible, and while interpreting the Will and deciding the rights over the terrace, this intention is to be kept in mind.

9.We have given our utmost consideration to the submissions of both the counsel and have also gone through the records. As mentioned above, there is hardly any dispute on the facts and the result of the case is dependent on the interpretation which is to be given to the Will. For this purpose, as was the plea of both the counsel, one is to gather the intention of the testator. For the purpose of gathering the intention, the entire Will is to be read.

10.In *Gnambal Ammal* (supra), the Apex Court while dealing with this aspect, observed as under :-

“10. The cardinal maxim to be observed by Courts in construing a will is to endeavour to ascertain the intentions of the testator. This intention has to be gathered primarily from the language of the document which is to be read as a whole without indulging in any conjecture or speculation as to what the testator would have done if he had been better informed or better advised. In construing the language of the will as the Privy Council observed in *Venkata Narasimha v. Parthasarathy*, 41 I.A. 51 at p.70 : (21 I.C. 339 P.C.),

“the Courts are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure. The Court is entitled to put itself into the testator's armchair'.....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. So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed, and none other. The Court is in no case justified in adding to testamentary dispositions..... In all cases it must loyally carry out the will as properly construed, and this duty is universal, and is true alike of wills of every nationality and every religion or rank of life.”

11. In Navneet Lal (supra), the following principles were laid down :-

“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 at p.772 = (AIR 1951 SC 139 at page 141)).

(2) In construing the language of the will the court is entitled to put itself into the testator's armchair (Venkata Narasimha v. Parthasarathy) (1913) 41 Ind App 51 at p.73 (PC) 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 at p.955 = (AIR 1951 SC 103 at pp.105-6)).

(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. Bakhtraj Kuer), 1953 SCR 232 at p. 240 = (AIR 1953 SC 7 at p. 9)).

(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 SCC 834 at pp. 839-842 = (AIR 1963 SC 1703 at pp. 1705-1706)).

(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 at p. 735 = (AIR 1964 SC 1323 at pp. 1328-1329)).”

12.Both the counsel are not at variance insofar as the legal position is concerned, as per which approach of this Court has to be to find out the intention of the testator. Though the parties are diametrically opposite in their perception about the intention of late Shri Tara Chand Gupta, who of the two is correct in his submission is the poser.

13.Undoubtedly, the testator was a retired District & Sessions Judge. He has mentioned so in the opening line of the Will in the very first paragraph. In the second paragraph of the Will, he mentions about his properties, immovable (the suit property) and movable; the fact that the suit property is self acquired over which he has the full and absolute disposition power; and his family members, namely, three sons and three daughters. In third para, he expressed his intention that he is bequeathing and disposing of his “movable and immovable property whatsoever and wheresoever” to his three sons and appoints Shri Lalit Chand Gupta, the elder son, as the sole executor. In para 4 he mentions that portion A would devolve upon Shri Lalit Chand Gupta, portion B upon the respondent No.1 herein and portion C upon the appellant as per the schedule attached, which is made part of the Will. Portion D is kept joint for common use. He also mentions that none of his sons would sell the house during his lifetime, except amongst themselves. He specifically disinherits all his daughters from the suit property. In para 5, he specifically confers rights upon Shri Lalit Chand Gupta and the appellant to construct second floor as per the respective portions given to them. In para 6 he bequeaths his money, wherein he gives certain amounts to his three daughters as well. In para 7 he takes care of his wife by mentioning that if she survives him after his death, she would be entitled to all movable and immovable properties during her lifetime and the bequeath given to his three sons and daughters from paras 3 to 6 shall not take effect during her lifetime and she would also have right to rent out any portion of the house during her lifetime. In para 8 he clarifies that he had executed the Will out of his free will and of sound disposing mind, without any pressure or coercion from any quarter whatsoever. Thereafter, he signs the Will, which is attested by two witnesses, one of whom is a

retired Assistant Commissioner of Income-Tax. Schedule attached to this Will has already been reproduced above.

14. Admittedly, nothing is mentioned above the terrace over the second floor. It is neither given to any of the sons specifically nor is included in the common portion. From the plain terms and language it is difficult to find out as to what he intended. The intention has to be gathered through the manner in which he wanted to bequeath the suit property.

15. In case of survival of the testator's wife after his death, the intention was to give the entire property to his wife during her lifetime and after her death in the manner stipulated therein. In case the wife predeceases the testator, the suit property is to be divided between the sons in specific portions. Though terrace is neither given to any of the sons nor specifically included in common portion, what would be the effect when the Will is silent about the same? If we see the intention of the testator from the holistic reading of the Will, we are inclined to agree with the findings recorded by the learned trial court. Our reasons for coming to this conclusion are the following :-

(1) The manner in which the property is divided between the three sons would show that intention was to give his three sons almost equal shares. This would be clear from the reading of para 3 of the Will wherein he stated that he was bequeathing all his movable and immovable property 'whatsoever and wheresoever' to his three sons. Further, the manner in which the respective portions were given to the three sons confirms this hypothesis. It is common knowledge that value of the ground floor is more than the first floor and that of first floor more than the second floor. Had he given one floor each to his three sons that would have led to inequitable distribution inasmuch as a son getting ground floor would have got the share in the property of better value than the son getting first floor and so on. To achieve maximum possible equality, the testator decided to divide ground floor between two sons and then give those two sons second floor in equal proportion, giving the third son the entire first floor. Thus, higher value of the ground floor is compensated by giving those two sons the second floor, which was of least value. Judicial notice can be taken of the fact that normally ground floor of the property is treated to be of 40% value, first floor 35% and second floor 25% in value. Thus, the two sons, who are given ground floor and second floor in equal proportion, get 32% each and the person getting the first floor gets 35%. By dividing in this method, the testator tried to achieve near equality, which would not have been possible by any other mode, except dividing the property vertically into three portions, which would have made the entire property inhabitable for all the three sons.

(2) Stipulation contained in para 5 almost clinches the intention of the testator. This para, wherein he has allowed the appellant and Shri Lalit Chand Gupta to construct specific portions on the second floor, starts with the following lines :-
“The Municipal Committee, Delhi, has allowed the construction of second floors in residential houses.”

It is clear from the above that it was in contemplation of the testator that the construction upto second floor is only permissible inasmuch as, as per the bye-laws prevailing at that time, no construction above the second floor was even allowed. It appears that because of this reason he did not mention anything about the construction rights over the second floor.

(3) The manner in which there is a minute and precise description of the three portions given to his three sons with exactitude, it would make the intention of the testator manifest, namely, the right to construct over the second floor is not given to any of his sons. This intention gets cemented from the reading of para 5 wherein he has again described in precise manner as to how the two sons, who were given the second floor would construct their respective portions, i.e. :

“5. The Municipal Committee, Delhi, has allowed the construction of second floors in residential houses. I, therefore, devise and direct that my son Lalit Chand Gupta will be entitled to construct the entire back portion already constructed on the first floor of the house, except the small bath-room (3¼ ft X 3½ ft) and the small kitchen (8½ ft X 5 ft) adjoining to it on the front eastern side. He will also be entitled to construct on the roof of the room on the back open courtyard, if and when constructed by my son, Raj Kumar Gupta. Similarly my son, Kanwal Krishan, shall get the roof of and will be entitled to construct the second floor, if and when my son Raj Kumar Gupta constructs over the big open roof (over the drawing room) on the eastern front side of the house. He will also be entitled to raise construction over the small bath-room (3¼ ft X 3½ ft) and small kitchen (8½ ft X 5 ft), mentioned above.”

The testator, who was a retired District & Sessions Judge and was so meticulous in his details about the construction of three floors, namely ground, first and second, would have definitely mentioned about the construction over the second floor as well if he had intended to bequeath the same to a particular son. His silence about the terrace rights over the second floor is predicated on the Municipal Bye-Laws as per which no such construction was allowed. No doubt, he did not visualise that there may be change in the bye-laws and permission will be given for construction of third floor as well. However, in such a case, having regard to the intention of the testator to give his three sons equal share in the property as far as practicable, it cannot be assumed that he intended to give terrace rights to the two

sons, who were given the second floor. If this is allowed, it would make the bequeath totally inequitable, which was not the intention of the testator. No doubt, the testator did not include terrace over the second floor even in the common portion, but if the intention is to be read that omission would mean that what is not specifically stipulated, which has become an important part of the property with changed circumstances and law, was intended to be bequeathed to the three sons equally and, therefore, the tilt would be in reading the intention of the testator in that manner and not the way the appellant wants. Therefore, we agree with the observation of the learned trial court that in the circumstances of this case, what had not been bequeathed in the Will would be deemed to have been left over by the testator to be shared by all the beneficiaries. However, we do not agree with the learned trial court that this consequence would flow on the presumption that the testator died intestate with regard to portion of roof rights over the second floor. Rather we go on the presumption that it would be deemed to be included in the common share by not specifically mentioning the same. This would be the most equitable solution of the problem as it seems to be most fair in the circumstances of the case.

16. Though the case is decided on legal principles, the equitable principles have weighed in our mind to arrive at appropriate legal principle. And what is 'equitable' will usually be construed as merely referring to what is 'fair' (Snell's Equity (1990) Sweet & Maxwell, p.6). At this juncture one may take note of a classical 18th Century statement of Sir Nathan Wright L.K. (Lord Dudley and Ward v. Lady Dudley (1907) Prec. Ch. 241 to 244) which reads as under :-

“Equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness and edge of the law, and is a universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions and new subtitles, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it but assist it.”

17. In *Garcia v. National Australia Bank*, (1998) 72 ALJR 1243, Kirby J. (at 1251) makes reference to the way that equitable doctrines are refined by the High Court to ensure that they keep pace with societal change :-

“...somehow, by some means, there is a movement that takes place in the exposition of legal principle. The movement may be readily perceived at a distance. Yet, although we may sometimes be unable to say how the law gets from one point to another, no one doubts that movement occurs or that it is “in response to the developments of the society in which (the law) rules. Gommow has pointed out that

the principles and doctrines of equity never pretended “like the rules of the Common Law to have been established from time immemorial”. Rather, they were “established from time to time – altered, improved, and refined from time to time”. So it is in this case.”

And later (at 1264) he says :-

“...equitable principles are themselves in a constant state of evolution in response to the developments of society. Borrowing against the family home to support a business venture is one such development which was not prevalent in earlier times. The changing nature of domestic relationships is another such development. Equitable doctrine is perfectly capable of adjustment to such changes. It does not need to use outmoded concepts, or anachronistic language, which pretend that things have remained the same as they were in 1939 when *Yerkey (v Jones)* was decided.”

18. Where two or more persons are entitled to an interest in the same property, then the principle of equity is equal division, if there is no good reason for any other basis for division. It has long been a principle of equity that in the absence of sufficient reasons for any other basis of division, those who are entitled to property should have the certainty and fairness of equal division; for “equity did delight in equality”. Therefore, the applicable maxim is “equality is equity” (Snell's Equity (1990) Sweet & Maxwell, p.36) or in other words, “equity delights in equality. In general, the maxim will be applied whenever the property is to be distributed between rival claimants and there is no other basis for division. Vaisey J. observed, “I think that the principle which applies here is Plato's definition of equality as a 'sort of justice': if you cannot find any other, equality is the proper basis” (*Jones v. Maynard* (1951 Ch. 572).

19. The above discussed maxim was also taken note of by this Court in *Bhagat Raja of Bombay v. Union of India*, 1976 (2) ILR (Del) 583. The Hon'ble Apex Court in *Madhu Kishwar v. State of Bihar*, (1996) 4 SCC 125, observed as under :-

“Law is the manifestation of principles of justice, equity and good conscience. Rule of law should establish a uniform pattern for harmonious existence in a society where every individual would exercise his rights to his best advantage to achieve excellence, subject to protective discrimination. The best advantage of one person could be the worst disadvantage to another. Law steps in to iron out such creases and ensures equality of protection to individuals as well as group liberties. Man's status is a creature of substantive as well as procedural law to which legal incidents would attach. Justice, equality and fraternity and trinity for social and economic equality.”

20. We, accordingly, do not find any merit in this appeal and, therefore, dismiss the same. However, parties shall bear their respective costs.

Sd/-
(A.K. SIKRI)
JUDGE

Sd/-
(ARUNA SURESH)
JUDGE