NARENDRA GOPAL VIDYARTHI

v.

RAJAT VIDYARTHI

(Civil Appeal No. 7010 of 2008)

DECEMBER 02, 2008

[S.B. SINHA AND CYRIAC JOSEPH, JJ]

Indian Succession Act, 1925 – ss. 74, 81 and 82 – Will – Interpretation of – Held: Will is to be read as a whole – Intention of testator must be asserted from the words used and the surrounding circumstances – On facts, testator executed Will and within one month purchased immovable property from the amount set apart for the benefit of his widowed daughter in law and her son – Order of High Court that by way of Will only limited interest bequeathed in favour of beneficiary and his mother, not sustainable – From the Will it can only be concluded that amount was set apart only for benefit of widow and her son – It might have been invested in immoveable property but only thereby they could not have been deprived of the amount – Thus, title to said property vested in the son – Though use of word 'wakf' was not appropriate but it only shows that testator intended to divest himself of the said property.

Words and Phrases: Wakf – Meaning of – Held Is taking out of one's ownership and passing it on to God's ownership dedicating its usufruct-without regard to indigence or affluence, perpetually and with the intention of obtaining Divine pleasure – It is for persons and individuals, or for institutions or mosques and graveyards, or for other charitable purposes – Wakf is neither gift nor trust.

Code of Civil Procedure, 1908 – s. 100 – Second appeal – Maintainability of – Held: Can be entertained if substantial question of law arises for its consideration and not otherwise

A *– Finding of fact arrived at by first appellate court is ordinarily final – Finding of fact may give rise to a substantial question of law when the same are based on no evidence or is otherwise perverse or that correct legal principles were not applied – On facts, question formulated by High Court* B *whether the property in dispute is a Joint Hindu Family property,* **per se,** *not a substantial question of law.*

BS executed a Will in year 1965. He had five sons. HS, father of the appellant was the eldest son and RS, father of the respondent, is the youngest son. BS died C **in 1973. Within a month from the date of the execution of the said Will, an immovable property was purchased for a sum of Rs.32,000/- from the amount set apart for the benefit of the appellant and his mother C. Respondent filed suit for declaration and permanent injunction against** D **the appellant alleging that he had been making attempts to dispose of the suit property belonging to the joint family. Appellant contended that the said property was bequeathed to his mother, thus, the respondent did not have any right over it. Trial court dismissed the suit** E **despite finding that the suit property was a joint family property. First appellate court reversed the finding that the suit property was a joint family property. Respondent filed second appeal. Two substantial questions of law were formulated that whether after dismissal of suit,** F **defendant has right to file appeal and whether the property in dispute is Joint Hindu Family Property. First question was answered in favour of appellant. With regard to second question, High Court held that the same was a joint family property. Hence the present** G **appeal.**

Allowing the appeal, the Court

HELD: 1.1. A finding of fact arrived at by the first appellate court is ordinarily final. Its correctness can be H **questioned if,** *inter aila,* **the same was based upon no**

evidence or is otherwise perverse or that correct legal principles were not applied. In terms of Section 100 CPC, the High Court can entertain a second appeal if a substantial question of law arises for its consideration and not otherwise. A finding of fact may give rise to a substantial question of law, inter alia, in the event the findings are based on no evidence and/or while arriving at the said finding, relevant admissible evidences have not been taken into consideration or inadmissible evidences have been taken into consideration. [Paras 13, 14 and 15] [971-F-H; 972-A-B]

1.2. The question formulated, whether the property in dispute is a Joint Hindu Family property, per se, is not a substantial question of law. High Court, however, proceeded on the basis that if the judgment is based on no evidence or is otherwise perverse, a substantial question of law would arise for consideration. It cannot be understood as to on what basis, the said question of law was formulated. Before an additional question is formulated, the procedure laid down therefor must be complied with. [Paras 13, 14 and 16] [971-G-H; 972-B-C]

Krishnan v Backiam & Anr. 2007 (11) SCALE 46 and *Boodireddy Chandraiah & Ors. v Airgela Lazmi & Anr.* 2007 (1) SCALE 188, Referred to.

1.2. The recitals in the Will show that he was aware of the uncertainties of life. He acknowledged that proper arrangements should be made for maintenance of C-his widowed daughter-in-law and the appellant. A bare perusal of the Will would show that he had kept apart Rs.30,000/- for the appellant and C. He had also a sum of Rs.10,000/- in a firm V. He thought of purchasing an immovable property for the benefit of the appellant and his mother but the same did not materialize. According to the testator, it was the duty of the brothers to look after the widow of his son and the appellant as they had been

A earning well, the child with his mother should live with them so as to enable him to meet the ups and downs of life. He did not want that the said amount should be wasted and for the said purpose, some sort of supervision was necessary. Therefore, he wanted to B make a 'wakf' in their favour so as to enable them not only to maintain themselves but also to spend for the education and upbringing as well as marriage of appellant. He declared that apart from himself, nobody else had any interest therein nor anybody can raise any C dispute in regard thereto. He made his sons the Executors of the wakf. He used the word 'wakf'. [Paras 20 and 22] [979-E; 981-A-C]

1.3. Some subsequent events took place. The house property in question was purchased by BS in his own D name from LK. After his death, the said property stood mutated in the name of C and after her death in the name of the appellant. No other family member objected thereto. High Court, in fact, recorded that for the purpose of obtaining the order of mutation, other family members E helped C. Admittedly, since the date of death of BS, the appellant and his mother alone have been in possession of the property. The suit was filed in 1995 and no other family member was impleaded. [Para 21] [980-C, D, E, F]

F 1.4. The ordinary meaning of 'wakf' is taking out something out of one's ownership and passing it on to God's ownership dedicating its usufruct – without regard to indigence or affluence, perpetually and with the intention of obtaining Divine pleasure – for persons and G individuals, or for institutions or mosques and graveyards, or for other charitable purposes. It is in their true sense neither gift nor trust. [Para 23] [981-E]

1.5. The Will provides that if the sum of Rs.30,000/- is found to be inadequate for purchase of an immovable H property, the amount of Rs.10,000/- which was available

with the partnership firm V be utilized which would be determinative factor as regards the extent of title of the property. The word used in the Will is 'karar'. It may mean determination; it may also mean agreement. But if the extent of the title is to be determined, the same will have a direct nexus with the amount spent from the sum of Rs.10,000/- which was with the partnership firm. If determination of the extent of the title has a nexus with the amount spent from the said sum of Rs.30,000/- *vis-a-vis* the said sum of Rs.10,000/-, title was to be passed in favour of the beneficiary. [Paras 26 and 27] [981-H; 982-A, B, C]

1.6. When a sum is to be invested in the immoveable property and in the event, any further sum is necessary, the extent of title is required to be determined, it does demonstrate the intention on the part of the testator. Wakf is a 'final dedication'. It goes out of the control of dedicator. The use of the said word may not be appropriate in a situation of this nature but that only goes to show that the testator intended to divest himself of the said property. [Para 28] [982-D-E]

1.7. The very fact that the testator categorically stated that the extent of title in the property will depend upon the amount of additional contribution required to be made from the fund of firm V itself is an indication to show that his wish was that title should vest in the beneficiaries to the extent of the property which represented the amount of Rs.30,000/- out of the total amount of consideration required to acquire the same. There cannot be any doubt whatsoever that his intention also was that the entire cash may not be paid to C as she was of gullible character. She could be made to part therewith by any other person by sweet words. A precaution was, therefore, required to be taken. The amount was required to be spent wisely. The amount which was required for

A their maintenance and education of appellant whether derived from the interest or from the rental only was to be handed over. It is only for the aforementioned limited purpose, the trust was created. The sole beneficiary of the trust was merely the appellant and his mother. It may B be true that the property was purchased in the name of the testator himself. The High Court commented that the same could have been done in the name of the appellant and his mother or at least the purchase could have been a joint one. But the Will is required to be construed on C the basis of the terms used therein and not otherwise. [Para 29] [982-F, G, H; 983-A-B]

1.8. Only because there does not exist any straight forward answer, the same would not mean that beneficiaries under the Will shall be deprived therefrom D only because the property was purchased in his own name by the testator. The testator had a long wish to purchase an immoveable property. He even thought of acquiring a property, price whereof might exceed Rs.30,000/-. If he wanted to keep apart the said sum of E Rs.30,000/- for the benefit of the appellant and his mother, he also wanted to bequeath the immoveable property purchased out of the said amount. [Para 30] [983-C-D]

1.9. How a Will has to be interpreted is no longer res integra. Intention of the testator must be ascertained from F the words used and the surrounding circumstances. The Court will put itself in the armchair of the testator. Applying the principles of construction of Will, as contained in ss. 74, 82 and 84 of the Indian Succession Act, if the Will is read as a whole and if the surrounding G circumstances are to be given effect to, the only conclusion that can be reached was that the amount of Rs.30,000/-was set apart only for the benefit of the appellant and his mother. It might have been invested in immoveable property but only thereby they could not H have been deprived of the amount. The title to the said

property vested in the appellant. Thus, order of High Court cannot be sustained and is set aside. [Paras 32, 33 and 34] [984-E, F, G; 989-D]

Navneet Lal v. Gokul **1976 (1) SCC 630;** *Arunkumar and Anr. v. Shriniwas and Ors.* **2003 (6) SCC 98;** *Bajrang Factory Ltd. v. University of Calucutta* **2007 (7) SCC 183;** *Anil Kak v. Kumari Sharda Raje and Ors.* **2008 (6) SCALE 597 and** *Shyamal Kanti Guha (D) Though LRs. and Ors. v. Meena Bose* **208 (9) SCALE 363, relied on.**

Case Law Reference:

2007 (11) SCALE 46	**Referred to.**	**Para 11**
2007(1) SCALE 188	**Referred to.**	**Para 11**
1976 (1) SCC 630	**Relied on.**	**Para 33**
2003 (6) SCC 98	**Relied on.**	**Para 33**
2007 (7) SCC 183	**Relied on.**	**Para 33**
2008 (6) SCALE 597	**Relied on.**	**Para 33**
2008 (9) SCALE 363	**Relied on.**	**Para 33**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7010 of 2008.

From the Judgment and final Order dated 4.4.2006 of the High Court of Judicature of Madhya Pradesh Bench at Gwalior in Second Appeal No. 356 of 2001.

Dhruv Mehta, Harshvardhan Jha, Yashraj Singh Deora and T.S. Sabarish (for M/s. K.L. Mehta & Co.) for the Appellant.

Dr. Om Prakash Saxena, Dr. Sumant Bhardwaj, Shamba Dutta and Mridula Ray Bhardwaj for the Respondent.

The Judgment of the Court was delivered by

A **S.B. SINHA, J.**1. Leave granted.

2. This appeal is directed against a judgment and order dated 4.4.2006 passed by a learned Single Judge of the High Court of Judicature of Madhya Pradesh, Gwalior Bench, Gwalior in Second Appeal No.356 of 2001 whereby and whereunder an appeal preferred by the respondent from the judgment and decree dated 2.7.2001 passed by the 9th Additional District Judge, Gwalior in Civil Appeal No.86A of 1999 affirming the judgment and decree dated 1.11.1999 passed by the XIth Civil Judge Class II, Gwalior in Civil Suit No.203A of 1996 dismissing civil suit filed by appellant/respondent, was allowed.

3. Controversy involved in this appeal centres around the construction of a Will executed by one Shri Bishan Sahai Vidyarthi on 21.11.1965. The said Bishan Singh Sahai died in or about 1973.

4. Indisputably, within a month from the date of the execution of the said Will, an immoveable property was purchased for a sum of Rs.32,000/-, inter alia, from the amount set apart for the benefit of the appellant and his mother.

5. Bishan Sahai Vidyarthi had five sons, namely, Rameshwar Sahai, Rajeshwar Sahai, Harbansh Sahai, Raghuvansh Sahai and Krishan Sahai; the eldest of them being Harbansh Shai, father of the appellant herein. Plaintiff-respondent Rajat Vidyarthi is son of Rameshwar Sahai, the youngest son of Bishan Sahai.

6. The aforementioned suit was filed by the respondent for declaration and permanent injunction against the appellant herein alleging that he had been making attempts to dispose of the suit property which is a house belonging to the joint family. Appellant, in his written statement, contended that the said property was bequeathed to his mother and, thus, the plaintiff-respondent had no right in relation thereto.

H 7. The learned Trial Judge, despite finding that the suit

property was a joint family property, inter alia, on the premise that no injunction can be granted against a co-owner in terms of Section 41(h) of the Specific Relief Act, 1963 and the only remedy available to the plaintiff was to file a suit for partition, dismissed the suit. A

8. The respondent did not prefer any appeal thereagainst. The appellant, however, preferred an appeal against the finding made therein that the suit property was a joint family property. By reason of a judgment and order dated 2.7.2001, the said appeal was allowed by the learned 9th Additional District Judge, Gwalior, holding : B C

> "21. At the time of execution of the Will, if Bishan Sahai was trying to purchase the house for Chandramukhi, but no appropriate and good house was found by him and even plaintiff has not initiated any proceedings on the ground that their money is invested in the disputed house before filing of the suit after the demise of Bishan Sahai, though Bishan Sahai had died in the year 1973. Therefore, this inference could be drawn from the conduct of other heirs of Bishan Sahai that the disputed house has been purchased from the amount payable to Chandramukhi. Therefore, plaintiff has failed to prove that the disputed house is the property of the Joint Family." D E

9. A Second Appeal was preferred thereagainst by the respondent. Two substantial questions of law were formulated which are : F

> "(1) Whether, after dismissal of the suit, defendant has right to file appeal?
>
> (2) Whether, the property in dispute is Joint Hindu Family Property?" G

The first question was answered in favour of the appellant. Respondent has not filed any appeal thereagainst. H

A So far as the second substantial question of law is concerned, the High Court held :

> Substantial question of law No.2 is "whether the property in dispute is Joint Hindu Family Property". To decide this substantial question of law, I will have to go through the record of the trial court, judgment and decree passed by trial court and lower appellant court. It is also necessary to peruse the evidence adduced by both the parties and if it reveals that learned First Appeal court's finding pertaining to sole ownership of defendant/respondents to disputed house is perverse, against evidence, misreading of evidence or overlooking of any evidence then, it would be necessary to re-appreciate the evidence adduced by both the parties."

D 10. Appellant is, thus, before us.

11. Mr. Dhruv Mehta, learned counsel appearing on behalf of the appellant, would submit :

(1) Keeping in view the fact that after death of Bishan Sahai, not only the property was mutated in the name of Chandramukhi, the mother of the appellant and also the appellant, the High Court committed a serious error in opining that by reason of the said Will dated 21.11.1965, only a limited interest has been bequeathed in favour of the appellant and his mother.

(2) The second question of law formulated is not a substantial question of law. The approach of the High Court in formulating the same was, thus, erroneous, wherefor no opportunity of hearing was given to the appellant.

Reliance in this behalf has been placed on *Krishnan v. Backiam & Anr.* [2007 (11) SCALE 46] and Boodireddy Chandraiah & Ors. v. Airgela

Laxmi & Anr. [2007 (1) SCALE 188].

(3) In any event, the High Committed a serious error insofar as it misconstrued and misinterpreted the said Will dated 21.11.1965 to hold that by reason thereof, only a limited interest in favour of the appellant had been bequeathed.

12. Dr. Saxena, learned counsel appearing on behalf of the respondent, on the other hand, would submit :

(1) No objection having been raised by the appellant before the High Court, it does not lie in the mouth of the appellant now to contend that the substantial question of law formulated by the High Court was not correct.

(2) A bare perusal of the Will dated 21.11.1965 would clearly show that the testator who was proficient in Urdu having used the word 'wakf' and a board of trustees consisting of four persons named therein having been constituted, no absolute interest had been or could have been conferred in the appellant.

13. One of the issues which arose for consideration before the High Court was as to whether the property in question was a joint family property. The learned Trial Judge answered the question in the affirmative. The same was reversed by the first appellate court. A finding of fact arrived at by the first appellate court is ordinarily final. Its correctness can be questioned if, inter aila, the same was based upon no evidence or is otherwise perverse or that correct legal principles were applied. The question formulated, namely, as to whether the property in dispute is a Joint Hindu Family property, per se, is not a substantial question of law.

14. The High Court, however, proceeded on the basis that if the judgment is based on no evidence or is otherwise perverse, a substantial question of law would arise for

A consideration. It is so but therefor also a substantial question of law must be framed. In terms of Section 100 of the Code of Civil Procedure, the High Court can entertain a second appeal if a substantial question of law arises for its consideration and not otherwise.

B 15. A finding of fact may give rise to a substantial question of law, inter alia, in the event the findings are based on no evidence and/or while arriving at the said finding, relevant admissible evidences have not been taken into consideration or inadmissible evidences have been taken into consideration.

C 16. We fail to understand as to on what basis, the said question of law was formulated. Before an additional question is formulated, the procedure laid down therefor must be complied with. This aspect of the matter stands concluded by D this Court in *Krishnan*'s case (supra), wherein it was held :

> "10. Under the amended Section 100 CPC the High Court has to frame substantial questions of law and can decide the second appeal only on those questions framed. A perusal of the questions framed shows that no question of E law was framed as to whether the finding of fact of the First Appellate Court that Lakshmi and Ramayee are one and the same person, is based on no evidence or is perverse.
>
> 11. It may be mentioned that the First Appellate Court under F Section 96 CPC is the last court of facts. The High Court in second appeal under Section 100 CPC cannot interfere with the findings of fact recorded by the First Appellate Court under Section 96 CPC. No doubt the findings of fact of the First Appellate Court can be challenged in second G appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect. In the present case no question was framed by the High Court as to whether the finding of H the First Appellate Court that Ramayee and Lakshmi are

one and the same person, is a finding based on no evidence or is perverse. Hence the findings of the First Appellate Court that Ramayee and Lakshmi are one and the same person, could not have been interfered with by the High Court." A

{See also *Subramaniaswamy Temple, Ratnagiri v. V. Kanna Gounder (Dead) by LRs.* [2008 (9) SCALE 386]}. B

Yet again in *Boodireddy Chandraiah's* case (supra), this Court opined: C

"8. The phrase 'substantial question of law', as occurring in the amended Section 100 CPC is not defined in the Code. The word substantial, as qualifying 'question of law', means-of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with-technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of 'substantial question of law' by suffixing the words 'of general importance' as has been done in many other provisions such as Section 109 of the *Code or Article* 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In *Guran Ditta v. T. Ram Ditta* the phrase 'substantial question of law' as it was employed in the last clause of the then existing Section 100 CPC (since omitted by the Amendment Act, 1973) came up for consideration and Their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case. In *Chunilal* case the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in *Rimmalapudi Subba Rao v. Noony Veeraju:* (*Chunilal* case) D E F G H

A '5. ... when a question of law is fairly arguable, where there is room for difference of opinion on it or where the court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial B question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those C principles to the particular facts of the case it would not be a substantial question of law.'

12. The principles relating to Section 100 CPC relevant for this case may be summarised thus :

D *(i)* An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question E of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

F *(ii)* The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of G law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is H clear, either on account of express provisions of law

or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

13. The general rule is that the High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where *(i)* the courts below have ignored material evidence or acted on no evidence; *(ii)* the courts have drawn wrong inferences from proved facts by applying the law erroneously; or *(iii)* the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

17. This Court, for the reasons stated hereinbefore, should ordinarily upon setting aside the judgment of the High Court, remit the matter to it. However, we, in view of the fact that the suit was filed in the year 1995 and the principal controversy between the parties is construction of the said Will dated 21.11.1965, thought it proper to dispose of the matter ourselves.

18. Before adverting to the said question, we may place on record that we have heard the learned counsel for the parties at some length on 17.7.2008. Appellant had furnished to us an unofficial translation of the said Will, correctness whereof was disputed by Dr. Saxena. We, therefore, entrusted the job to the official translator. A copy of the said Will, as translated by the official translator, has been placed before us. It is accepted by the counsel for both the parties that the said translation, to put it simply, even does not carry any meaning.

A We, therefore, chose to ignore the same.

19. The translated portions of the Will which are disputed one are as under ;

Extract of Will Official	Translation	Correct Translation
मेरी आखिरी ख्वाइश है कि अपने तमान वसीयत नामों को मंसूख करके इस वसीयतनामें के जरिये जो मैं बहाबास तहरीर कर रहा हूं अपने आखिरी अशाशा और जिन्दगी भर की खुद पैदा करदा कमाई में से मुवलिग तीस हजार 30,000/- रूपया जिसके सिफमुवलिग पंद्रह हजार 15,000/- रूपया होते हैं कि अजीज नरेन्द्र गोपल विद्यार्थी और उसकी माँ चन्द्रमुखी विद्यार्थी के मफाद के लिए वक्फ कर दूं जिससे नरेन्द्र गोपाल की तालीम व तरखीयत व शादी वगैरह और उसकी माँ उसकी माँ की गुजर बसर खाने कपड़े वगैरह का माकूल इन्तजाम हो सके और आजीवन किसी तरह की तकलीफ और परेशानी न हो। इस मुस्तरज़ा वाला रकम पर मेरे सिवाय मेरे और किसी का कोई हक और मुतालवा नहीं है और मुझे अपनी ख्वाईश के मुताबिक इस रकम के इस्तेमाल और सर्फ	My last willing-ness is that I shall cancel my all previous Wills and by way of this Will, I in my complete mental and physical consciousness, execute that out of my self acquired earnings a sum of Rs.30,000/- (Rupees fifteen thousand only) be spared or set apart from the benefit of Dear Narendra Gopal Vidyarthi and his widowed mother Chand-ramukhi Vidyarthi so that the study and marriage etc. of Narendra Gopal and Livelihood of his mother such as fooding and clothes could easily be arranged and they would not get any difficulty in their lives. No one has any right or claim over his Mundaraja amount and I have complete right to use this as per my wishes and nobody has any objection or right to raise dispute. Therefore in my complete physical and mental consciousness by way	It is my last wish that by way of this will, which I am stating in my senses, that from my self acquired earn-ings of whole life, only Rs.30,000/- (Rs. Thirty thousand only), the half of which is only Rs.15,000/- (Rupees fifteen thousand only) may give 'Wakf' for the benefits of dear Narendra Gopal Vidyarthi, and his widow mother Chander Mukhi Vidyarthi, by which for the education and mainten-ance and for the marriage etc. of Narendra Gopal and for the maintenance, food, clothes etc. of his Mother appropriate arrangement could be made, and throughout life, there may not be any type of difficulty and problem. On this stipulated amount excepting me, there is not right or concern of anyone else, and I, according to my wish, for the use and

के लिए वसीयत करने का पूरा पूरा हक है और किसी शख्स को इस पर कोई एतराज या झगड़ा करने का हक नहीं है। लिहाजा बदुरूस्ती होश हवास इस वसीयतनामे के जरिये में बिशन सहाय पुत्र लाला शिव सहाय मुरदरजा वाला तीस हजार रूपया को जो बैंक ऑफ इंडिया लि० ग्वालियर ब्रांच में सेविग बैंक एकाउन्ट में जमा है अजीज नरेन्द्र गोपाल विद्यार्थी और उसकी माँ चन्द्रमुखी विद्यार्थी के के मफाद के लिए वक्फ करके एक ट्रस्ट कायम करता हूँ.....

तीस हजार रूपया 30000 जो मैनें नेरन्द्र गोपाल और उसकी माँ के लिए वक्फ किया है जहाँ तक मुमकिन हो गैर मनकूला जायदाद में लगा दिया जाय। अब तक मकान खरीदने की कोशिशें नाकाम रही हैं–अगर गैर मनकूला जायदाद खरीदने में कक्फ करदा तीस हजार रूपया 30000 से ज्यादा दरकार हो तो विद्यार्थी एण्ड सन्स के सरमाये मे से लगा दिया जाय और हकमिल्कीयत उसी के मुताबिक कर दिया जाय।

of this Will, I Vishun Sahay son of Lala Sibo Sahay hereby gifting the Mundaraja amount of Rs.30,000/- Rupees thirty thousand only) which has been deposited in the Saving account of Bank of India Ltd., Gwalior Branch in the name of dear Narendra Gopal and his mother Chandar Mukhi Vidhyarthi and thus for their benefit I am making a trust ...

The amount of the said Rs.30,000/- which has been spared by me in the name of Narendra Gopal and his widowed mother, as far as possible, shall be invested in the immoveable property. Till date the efforts to purchase house has not been fulfilled. If in the purchase of immovable property a sum of more than the sum of Rs.30,000/- is required then the same shall be invested from the working capital of Vidyarthi and Sons and agreement share be made accordingly.

In any circumstances, at one time the number of the trustees

spending, I have complete right to make the Will, and no other person has any right to object or quarrel. As such in my complete senses, by way of this will, I Bishan Sahai son of Lala Shiv Sahai, by separating, the amount of Rs.30,000/- which is deposited in savings accounts in the Bank of India Ltd., Gwalior Branch, for the benefits of Nare-ndra Gopal Vidyarthi, and his mother Chander Mukhi Vid-yarthi, hereby 'WAKF' to establish a Trust .....

Rupees thirty thousand (30,000/-) which I have Wakf for Narendra Gopal and his mother, so far as possible may be invested in immoveable property. Efforts to purchase the house4 have remained unsuccessful till now. In case in the pur-chase of the immov-able property, if more than the Wakf amount of Rupees thirty thousand (30,000/-) is

किसी भी सूरत में जरिये एक वक्त में ट्रस्टीज की तादाद चार से ज्यादा न रहेगी अगर कोई भी ट्रस्टी तन्हा या मुस्तरका तौर पर इस वसीयतनामे के जरिये क ायम किये गये ट्रस्ट की खिलाफ वरजी करे या ट्रस्ट की रकम या जायदाद अपने जाति मफाद के लिये इस्तेमाल करे तो इस ट्रस्टी को अपने ओहदे से बरतरफ समझा जाये और बाकी माँदा ट्रस्टीज उसके खिलाफ कार्यवाई कर सकेंगे परमात्मा मेरी तमन्ना पूरी करे और मेरी आत्मा को शांति बक्शे।	shall not be more than four. If any trustee act against the motive of this trust of uses the amount of this trust for his own benefit then the said trustee would be presumed to be removed from the post of trustee or property of this trust and the remaining trustee of this trust would take action against him. May God fulfill my wishes and grant peace to my soul.	required, then that may be invested from the capital of Vidyarthi & sons and the rights of ownership may be fixed according to that. In any case, at any time, the number of Trustees shall not be more than four, if any trustee singly or jointly acts against the motive of the trust created by this will or uses the money as property of the trust for his personal benefit then the said trustee would be presumed to be removed from his post of trustee and the remaining trustees will be able to take action against him. May God fulfill my wishes and give peace to my soul.

According to the respondent, the aforementioned controversial portion should read as under :

"In such circumstances, if immovable property does not get available, handing over of cash amount to her would be useful destruction. Therefore, for the purpose of safety of the amount, it would be must that she be not given all big cash amount. Watch on rental amount and interest is must. For the bigger expenditure, the decision and sanction of the trustees is necessary.

If immovable property becomes available then rent of the same otherwise the bank interest over the said amount of

Rs.30,000/- shall be given to the Narendra Gopal and his widowed mother for their personal expenses so that they would not have to stretch their hands before anyone for the personal expenses. In this regard trustees have to be gracious and farsighted. It would be taken care that the property shall remain family and would not be mortgaged or sold.

Rs.30,000/- was set apart for the limited purpose of maintenance and for the benefit of Vaidarthi and his mother.

This means that the intention of the testator was that only small amount should be given not a big amount and for the safety of the amount, big cash should not be given to the widowed mother or the petitioner. Strict vigil would be must. The decisions and sanction of the trustees is necessary. Watch on rental and interest is must. They wanted to bring up the widowed mother as well as the minor child and for that purpose they spared that amount."

20. We have also been taken through the entire original Will. The testator had a philosophical bent of mind. The recitals in the Will show that he was aware of the uncertainties of life. He had made a Will also on 19th February, 1959. As he lived till 1965, he executed the Will in question. The Will recites that God had been kind enough to him. He had four daughters, Sunbderkala, Sarladevi, Shanti Devi and Lakshmi Devi who were happily married. He also acknowledged that he had five sons, Raghuvansh Sahay (Mithubabu), Harbans Sahay (Kaptan), Rameshwar Sahay, Rajeshwar Sahay and Krishna Sahai (Kisho). He also stated that out of the five sons, four, namely, Raguuvansh Sahay, Rameshwar Sahay, Rajesnwar Sahay and Krishna Sahay were highly educated and well placed in their life. They are married and were in employment. They had been leading a happy life. He wished a long and prosperous life for them. However, he expressed his agony for the death of his eldest son Harvansh Sahay (Kaptan) who had

A died in the year 1949 leaving behind a small child and a young wife. He acknowledges that proper arrangements should be made for maintenance of Chandramukhi, his widowed daughter-in-law. Some arrangements should also be made for education, maintenance and marriage of her son Narendra B Gopal. It appears from the Will that he had saved about Rs.30,000/-. Indisputably, he had also a sum of Rs.10,000/- in a firm known as "Vidyarthi and Sons". Indisputably again, he thought of purchasing an immoveable property for the benefit of the appellant and his mother but the same did not C materialize.

21. It is in the aforementioned backdrop of facts, the Will in question is required to be construed. Before we proceed to do so, we may also notice some subsequent events. The house property in question was purchased by Bishan Sahai in his own D name from Smt. Laxmibai Kelkar. After his death which took place in 1973, the said property stood mutated in the name of Chandramukhi Devi and after her death in the name of the appellant. No other family member objected thereto. The High Court, in its impugned judgment, has, in fact, recorded that for E the purpose of obtaining the order of mutation, the other family members helped Chandramukhi. They also filed applications for exemption from payment of property tax by her. Admittedly, since the date of death of Bishan Sahai, the appellant and his mother alone have been in possession of the property. The suit F was filed in the year 1995. Therein, no other family member was impleaded. If the plaintiff-respondent intended to obtain a declaration that the property in question is a joint family property, it was expected that other family members would be impleaded. None of the sons of Bishan Sahai was examined G as a witness. No explanation was sought for from them as to why they themselves were instrumental in getting the name of Chandramukhi mutated.

22. A bare perusal of the Will would show that he had kept apart Rs.30,000/- for Chandramukhi and the appellant. The H

purpose of doing so was that from his income, he had made jewelleries for others. The Will speaks of division of the utensils also. According to him, it was the duty of the brothers to look after the widow of his son Kaptan and Narendra Gopal, as they had been earning well, the child of with his mother should live with them so as to enable him to meet the ups and downs of life. He did not want that the said amount should be wasted and for the said purpose, some sort of supervision was necessary. He, therefore, wanted to make a 'wakf' in their favour so as to enable them not only to maintain themselves but also to spend for the education and upbringing as well as marriage of Narendra Gopal. He declared that apart from himself, nobody else had any interest therein nor anybody can raise any dispute in regard thereto. He made his sons the Executors of the wakf. He as, indicated hereinbefore, used the word 'wakf'.

23. What should be the true meaning of the said word is the question. Whereas, Mr. Mehta submits that it should be treated as 'gift', according to Dr. Saxena, the same connotes a trust. The ordinary meaning of 'wakf' is taking out something out of one's ownership and passing it on to God's ownership dedicating its usufruct – without regard to indigence or affluence, perpetually and with the intention of obtaining Divine pleasure – for persons and individuals, or for institutions or mosques and graveyards, or for other charitable purposes. It is in their true sense neither gift nor trust.

24. Gift of some amount in cash does not require registration nor does the statutory requirements as contained in Sections 122 and 123 of the Transfer of Property Act are attracted therefor.

25. Was it the amount which was the subject matter of the Will or an immoveable property which was to be purchased from the said amount, meant to be transferred in favour of the respondent absolutely is the question.

26. The Will provides that if the sum of Rs.30,000/- is found

A to be inadequate for purchase of an immoveable property, the amount of Rs.10,000/- which was available with the partnership firm vidyarthi & Sons be utilized which would be determinative factor as regards the extent of title of the property.

B 27. The word used in the Will is 'karar'. It may mean determination; it may also mean agreement. But if the extent of the title is to be determined, the same will have a direct nexus with the amount spent from the sum of Rs.10,000/- which was with the partnership firm. If determination of the extent of the title has a nexus with the amount spent from the said sum C of Rs.30,000/- *vis-à-vis* the said sum of Rs.10,000/-, title was to be passed in favour of the beneficiary.

28. This gives rise to two questions which are of some importance. When a sum is to be invested in the immoveable D property and in the event, any further sum is necessary, the extent of title is required to be determined, does it demonstrate the intention on the part of the testator. In our opinion, it does. Wakf is a 'final dedication'. It goes out of the control of dedicator. The use of the said word may not be appropriate in E a situation of this nature but that only goes to show that the testator intended to divest himself of the said property.

29. The very fact that the testator categorically stated that the extent of title in the property will depend upon the amount of additional contribution required to be made from the fund of F Vidyarthi and Sons itself is an indication to show that his wish was that title should vest in the beneficiaries to the extent of the property which represented the amount of Rs.30,000/- out of the total amount of consideration required to acquire the same. There cannot be any doubt whatsoever that his intention G also was that the entire cash may not be paid to Chandramukhi as she was of gullible character. She could be made to part therewith by any other person by sweet words. A precaution was, therefore, required to be taken. The amount was required to be spent wisely. The amount which was required for their H maintenance and education of appellant whether derived from

the interest or from the rental only was to be handed over. It is only for the aforementioned limited purpose, the trust was created. The sole beneficiary of the trust, in our opinion, was merely the appellant and his mother. It may be true that the property was purchased in the name of the testator himself. The High Court commented that the same could have been done in the name of the appellant and his mother or at least the purchase could have been a joint one. But the Will is required to be construed on the basis of the terms used therein and not otherwise.

30. The answer to the question may be difficult one. Only because there does not exist any straight forward answer, the same would not mean that beneficiaries under the Will shall be deprived therefrom only because the property was purchased in his own name by the testator. The testator had a long wish to purchase an immoveable property. He even thought of acquiring a property, price whereof might exceed Rs.30,000/-. If he wanted to keep apart the said sum of Rs.30,000/- for the benefit of the appellant and his mother, we think he also wanted to bequeath the immoveable property purchased out of the said amount.

31. The Indian Succession Act contains provisions for construction of the Will. We may notice some of them.

> **"74 – Wording of Will-**It is not necessary that any technical words or terms of art be used in a Will, but only that the wording be such that the intentions of the testator can be known therefrom.
>
> **82 – Meaning or clause to be collected from entire Will-**The meaning of any clause in a Will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other.
>
> Illustrations
>
> (i) The testator gives to B a specific fund or property at

A the death of A, and by a subsequent clause gives the whole of his property to A. The effect of the several clauses taken together is to vest the specific fund or property in A for life, and after his decease in B; it appearing from the bequest to B that the testator meant to use in a restricted B sense the words in which he describes what he gives to A.

(ii) Where a testator having an estate, one part of which is called Black Acre, bequeaths the whole of his estate to A, and in another part of his Will bequeaths Black Acre to C B, the latter bequest is to be read as an exception out of the first as if he had said "I give Black Acre to B, and all the rest of my estate to A".

84-Which of two possible constructions preferred- D Where a clause is susceptible of two meanings according to one of which it has some effect, and according to the other of which it can have none, the former shall be preferred."

E 32. Applying the principles of construction of Will, as contained in the aforementioned provisions, we are of the opinion that if the Will is read as a whole and if the surrounding circumstances are to be given effect to, the only conclusion that can be reached was that the aforementioned amount of Rs.30,000/-was set apart only for the benefit of the appellant F and his mother. It might have been invested in immoveable property but only thereby they could not have been deprived of the amount.

33. How a Will has to be interpreted is no longer res G integra. Intention of the testator must be ascertained from the words used and the surrounding circumstances. The Court will put itself in the armchair of the testator.

In *Navneet Lal v. Gokul* [(1976) 1 SCC 630] it has been H held:

"**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*)

(2) In construing the language of the will the court is entitled to put itself into the testator's armchair (*Venkata Narasimha v. Parthasarathy*) 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 case and Gnanambal Ammal v. T. Raju Ayyar*)

(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*)

(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

A 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 B 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 C not create any such hiatus. (Pearey *Lal v. Rameshwar Das*)

(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 D 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 E 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. Hilda Brite Mrs*)'."

F {See also *Arunkumar & Anr. v. Shriniwas & Ors.* [(2003) 6 SCC 98]}

This aspect of the matter has recently been considered in *Bajrang Factory Ltd. v. University of Calcutta* [(2007) 7 SCC 183], whereir it was held:

G

"39. With a view to ascertain the intention of the maker of the will, not only the terms thereof are required to be taken into consideration but also all circumstances attending thereto. The will as a whole must, thus, be considered for H the said purpose and not merely the particular part thereof.

As the will if read in its entirety, can be given effect to, it is imperative that nothing should be read therein to invalidate the same. A

40. In construing a will, no doubt, all possible contingencies are required to be taken into consideration, but it is also a well-settled principle of law that only because a part of a document is invalid, the entire document need not be invalidated, if the former forms a severable part. The legatee admittedly did not have any issue, nor did he adopt or appoint any person. In a situation of this nature, effect can be given to Clause 12 of the will, if it is read as occurring immediately after Clause 5 of the original will. As the said clause stands on its own footing, its effect must be considered vis-à-vis Clause 6, but the court may not start with construction of Clauses 6 and 7, which may lead to a conclusion that Clause 5 is also invalid. The contingencies contemplated by Clause 6 may not have any effect on Clause 7, if it does not take place at all. The property which should have been purchased with the sale proceeds could have been the subject-matter of the bequest and in terms thereof the University of Calcutta became the beneficiary on the death of the original legatee. We do not find any reason as to why the same cannot be given effect to. We have indicated hereinbefore that it is possible to construe Clause 7 of the will and in fact a plain reading thereof would, thus, lead to the conclusion that it merely provides for an option given to the legatee to take recourse thereto. We have also indicated hereinbefore that the term "devise" in the context of Clause 7 does not carry any meaning and, therefore, the same for all intent and purport should be substituted by the word "desire". As a matter of fact, the appellant in the copy of the will supplied to us had also used the word "desire" in place of the word "devise", which would also go to show that even the appellant understood Clause 7 in that fashion. Clause 7, if so read, will have no application to the B C D E F G H

A properties which were to be substituted in place of the immovable properties belonging to the testator. The benefit of the sale proceeds, thus, in absence of any action on the part of the legatee in terms of Clause 7 shall also vest in the University. Moreover, the questions as to B whether the deed of sale purported to have been executed by the legatee in favour of Chamong Tea Co. Ltd. or other instruments executed by him in favour of the appellants herein are pending for consideration before the High Court which may have to be determined on its own merit. In the C event the said transactions are held to be void, the question of giving any other or further effect to Clause 6 of the will may not arise."

In *Anil Kak v. Kumari Sharda Raje & Ors.* [2008 (6) SCALE 597], this Court stated :

D

"The testator's intention is collected from a consideration of the whole Will and not from a part of it. If two parts of the same Will are wholly irreconcilable, the court of law would not be in a position to come to a finding that the Will E dated 4.11.1992 could be given effect to irrespective of the appendices. In construing a Will, no doubt all possible contingencies are required to be taken into consideration. Even if a part is invalid, the entire document need not be invalidated, only if it forms a severable part. [See *Bajrang* F *Factory Ltd. and Anr. v. University of Calcutta and Ors.* [(2007) 7 SCC 183]

In Halsbury's Laws of England, Fourth edition, Volume 50, page 332-33, it is stated :

G '462. *Leading principle of construction:* The leading principle of construction which is applicable to all wills without qualification and overrides every other rule of construction is that the testator's intention is collected from a consideration of the H whole will taken in connection with any evidence

properly admissible, and the meaning of the will and of every part of it is determined according to that intention'." A

In *Shyamal Kanti Guha (D) Through LRs. & Ors. v. Meena Bose* [2008 (9) SCALE 363], it is stated : B

"Keeping in mind the aforementioned backdrop, the Will should be construed. It should be done by a Court indisputably placing itself on the arm-chair of the testator. The endeavour of the Court should be to give effect to his intention. The intention of the testator can be culled out not C only upon reading the Will in its entirety, but also the background facts and circumstances of the case."

Following the said principles, we have no hesitation to hold that the title to the said property vested in the appellant. D

34. For the reasons aforementioned, we are of the view that the impugned judgment cannot be sustained. It is set aside accordingly. Appeal is allowed with costs. Counsel's fee assessed at Rs.50,000/-. E

N.J. Appeal allowed.